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In the Supreme Court of the United States

OCTOBER TERM, 1955

No.

UNITED STATES OF AMERICA, PETITIONER

v.

UNION TRUST COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in these cases on February 8, 1955, by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The District Court opinion (IR. 36–46)[1] is reported at 113 F. Supp. 80. The opinion of the Court of Appeals (App. A, *infra,* pp. 1a–41a) is reported at 221 F. 2d 62.

[1] Record references are indicated as follows: the roman numeral refers to the volume of the Joint Appendix in the Court of Appeals; the arabic number refers to the page of that volume. The letter "A" affixed to each page number of the Joint Appendix is omitted.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1955 (App. A, *infra*, pp. 42a–44a). Following the entry of orders enlarging their time to do so (*id.*, pp. 44a–46a), the United States filed a timely petition for rehearing *in banc*, and respondents filed a petition for rehearing *in banc* or by the original division. Both petitions for rehearing *in banc* were denied on April 15, 1955 (*id.*, pp. 46a–48a); respondents' petition for rehearing by the division was denied on May 11, 1955 (*id.*, pp. 48a–49a). On July 9, 1955, Mr. Justice Frankfurter extended the time of the United States for filing a petition for a writ of certiorari to and including August 9, 1955 (*id.*, p. 51a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States is subject to liability under the Federal Tort Claims Act for the negligence of its control tower operators in regulating air traffic.

2. Whether the discretionary function exception of that Act (28 U. S. C. 2680 (a)) bars claims arising from the discretionary acts of federal employees at "the operational level" as well as acts at the policy-forming level.[2]

[2] See also *infra*, fn. 17 at pp. 15–16, and fn. 41 at p. 37.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act are set forth in Appendix B, *infra*, pp. 52a–53a.

STATEMENT

a. *The litigation.*—On November 1, 1949, an Eastern Air Lines DC–4, with 51 passengers and a crew of 4, collided in mid-air with a P–38 military type plane, owned by the Bolivian Government, while both craft were coming in for a landing at the Washington National Airport. All of those aboard the DC–4 were killed. Bridoux, a Bolivian Air Force officer, who was alone in the P–38, survived. As a result of the accident, over 100 suits were brought in various jurisdictions against Eastern, against Bridoux, and against the United States. The complainants asserted that the pilot and co-pilot of Eastern's plane were negligent, that Bridoux was negligent, and that Civil Aeronautics Administration employees in the Airport's control tower were negligent in regulating the air traffic at the Airport (IR. 22–24). The actions against the United States, more than 60 in number, were brought under the Federal Tort Claims Act (28 U. S. C. 1346 (b), 2671–2680).

To avoid multiplicity, four actions brought by the executors of Mr. and Mrs. Ralph F. Miller, deceased passengers on the DC–4, were chosen as test cases—two of the actions were against Eastern and Bridoux as joint defendants, and two

were against the United States.[3] The cases were consolidated for trial. Those against Eastern and Bridoux were tried to a jury; simultaneously, those against the United States were tried to the court alone. The jury found Eastern negligent and responsible for the accident, but Bridoux not; it awarded $50,000 for the death of Ralph F. Miller and $15,000 for the death of his wife (I R. 55–57). The trial judge found the Government negligent in, and subject to liability for, the manner in which it had regulated air commerce at the Airport; that negligence, he found, "concurred with the negligence of Eastern" in causing the accident (I R. 51, 45). Like the jury, he found that the accident occurred in the District of Columbia and he awarded damages against the United States in the same amounts (I R. 52).

On appeal, the judgment against the United States relating to Mrs. Miller was affirmed, but the judgment relating to Mr. Miller was reduced to $15,000 to accord with the Virginia statute

[3] Virtually all of the claimants stipulated with the defendants that the final determinations in these four actions shall bind all on the question (a) of the liability of the defendants, and (b) of whether the Wrongful Death Statute of Virginia or of the District of Columbia is applicable. One of the issues litigated was whether the collision occurred over land in Virginia or over the Potomac River in the District of Columbia. Under the Virginia death statute then applicable, recoveries were limited to $15,000 (Va. Code, 1942, § 5787); there was no limitation under the District's statute.

and, as so modified, was affirmed.[4] This petition relates only to the two cases brought against the United States.

b. *Federal regulation of air traffic.*—Civil aviation in all its phases has been made the subject of intensive regulation by the Federal Government under the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. 401 *et seq.*, in order to promote the development and safety of air commerce. Pursuant to that Act, regulations have been promulgated which cover such subjects as minimum standards for the construction, performance, and maintenance of aircraft; qualifications for the issuance of certificates to airmen, aircraft and air carriers; the operation of the business of air transportation, etc. All air traffic is governed by regulations promulgated by the Civil Aeronautics Board (CAB).[5] These regulations and rules are administered by the Civil Aeronautics Administration (CAA). CAA is empowered to establish and operate air navigation facilities wherever necessary, and is authorized "to provide necessary facilities and personnel for the *regulation and protection* of air traffic" (49 U. S. C. 452 [emphasis added]). Under this and other

[4] The judgments against Eastern were reversed and its cases were remanded for a new trial because of the erroneous submission of an issue to the jury.

[5] Air traffic rules ("rules of the road") applicable in 1949, when the accident here involved occurred, are set out at 14 C. F. R., 1949 Ed., Pt. 60.

authority, CAA has established a vast and intricate network of civil airways ("air highways") and of air navigation facilities, which includes hundreds of aeronautic communication systems, radio range stations, beacons, radar installations, etc., analogous to, but much more complex than, the network of navigational aids maintained by the Coast Guard for mariners.

Among the most important facilities maintained by CAA for the regulation and protection of air commerce are airport control towers. The towers regulate and control air traffic operating in the vicinity of airports. Almost all control towers in the United States, regardless of the ownership of the particular airport, are maintained by the CAA and are operated by CAA employees known as air traffic controllers.[6] They are certificated

[6] The congestion of air traffic at the busier air terminals presented a constantly increasing problem. Before enactment of the Civil Aeronautics Act of 1938, control towers were erected and operated by cities at municipal airports. Soon after 1938, CAA began to take over, construct, and operate the towers. See 49 U. S. C. 452. In 1943, it operated some 100 towers. In 1949, when the instant accident occurred, it was operating 165 of the nation's 200 towers. The number has increased since then.

The so-called "private" towers are operated under authority delegated by CAA and under rigid CAA supervision (see *infra*, pp. 26–28). They are, for the most part, located at private airfields which have little or no public traffic. In determining whether funds should be appropriated to CAA to operate towers at airfields which have public air traffic, the Appropriations Committees of Congress, in cooperation with CAA, apply a point system to measure the density of the public traffic. When the airfield attains a stated mini-

by CAA after a training course followed by written and physical examinations, and periodic reexaminations (14 C. F. R., Pt. 26). Their functions are analogous to those of a traffic policeman at a busy highway intersection, although more complicated because of the three dimensional aspect of flight. (II R. 273–4, IV R. 862; VII R. 1353).

When operating in the vicinity of an airport, aircraft are required to maintain radio or visual contact with the tower so as to receive any instructions which may be issued. 14 C. F. R., § 60.18 (b). When an affirmative instruction is issued by the tower, it must be obeyed.[7] Violation of an affirmative tower instruction may result in penalties such as fines, revocation or suspension of a pilot's certificate, etc.[8] On the other hand, certain of the functions of the tower are merely informational, advisory or permissive.[9]

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mum of traffic points, funds ordinarily are appropriated. See, *e. g.*, *Hearings before the Subcommittee of the Committee on Appropriations*, U. S. Sen., 80th Cong., 1st Sess., on *H. R. 3311*, pp. 971, 975–6; *Hearings before the Subcommittee of the Committee on Appropriations*, H. of Reps., 80th Cong., 2d Sess., *on the Dept. of Commerce Appropriation Bill for 1949*, pp. 223–7; S. Rep. No. 343, 80th Cong., 1st Sess., p. 6; S. Rep. No. 435, 81st Cong., 1st Sess., p. 7.

[7] 14 C. F. R. §§ 60.19, 60.21, 60.10. Only in emergency situations may the pilot deviate from an affirmative instruction of the tower or from prescribed Air Traffic Rules. 14 C. F. R. §§ 60.2, 60.21.

[8] See 49 U. S. C. 559, 560 (a) (5), 621; see also, E. Duval, *The Enforcement of Safety Regulations by the CAA*, 35 Calif. L. Rev. 280 (1947).

[9] See 14 Fed. Reg. pp. 3335–3349, §§ 26.50–61 to 26.50–70.

Thus, the tower will advise pilots of wind and weather data, field conditions, traffic information; it also issues various clearances, *e. g.*, to taxi, to take-off, or to land. A landing clearance, unlike an affirmative tower command (such as to ascend or to turn), is only permissive in nature; it is intended as an authority to the pilot to proceed with a landing in such manner as his judgment dictates, consistent with the safe management of his plane (X R. 2030, 2036, 2038–2040; 14 Fed. Reg. p. 3341, § 26.50–65). The Regulations provide that it is the pilot's direct responsibility to avoid collision with other aircraft, that the information and clearances given by the tower are intended only as an aid to the pilot, not as a substitute for that responsibility.[10] The Regulations also provide that the tower shall give such information to pilots as "in the judgment" of the air traffic controller is necessary for safety (14 Fed. Reg. p. 3344, § 26.50–66 (b) (1)).

A plane approaching Washington for a landing usually contacts the airport control tower when it is 15 to 20 miles away (VI R. 1260, 1296) and until it lands it remains in contact with the tower. In this initial call, the pilot may request landing instructions. The air traffic controller will respond by specifying the runway to be

[10] 14 Fed. Reg. p. 3344, § 26.50–66; *ibid.*, pp. 3335–6, § 26.50–61 (b) (1). The text refers to flight by visual reference (VFR), which is the situation present here. Other regulations apply to instrument flight (IFR).

used, advising the pilot of wind and weather conditions, giving such traffic information as is deemed pertinent, and giving a clearance *to enter the traffic pattern,* as distinguished from a clearance *to land* (I R. 188–9, VI R. 1260–1, VII R. 1346). The traffic pattern is the prescribed path or flow of traffic around the immediate vicinity of the airport (see Pltf's Ex. 7, XI R. 2128A–3).[11] A plane may not ordinarily enter the traffic pattern until it receives a tower clearance, and, once within the pattern, it may not land until the tower gives a specific clearance to land (X R. 2036, 2029–2030).

After the plane is within the pattern, its pilot will again contact the tower and request a clearance *to land.* If his is the first aircraft in the pattern, he may then be cleared to land. But if

[11] The path of a plane landing on Runway 3 (which heads in a generally northerly direction and which is the runway here involved) is prescribed as follows (see Pltf's Ex. 7, XI R. 2128A–3; X R. 2108; 14 Fed. Reg. p. 6250, § 570.55 (c)): the plane enters the traffic pattern at a point northwest of the airport and proceeds in a southerly direction to a point south of Alexandria (this is called *the downwind leg*), then it turns and proceeds east until over the Potomac River (this easterly flight is called *the base leg*), then it turns north and, after a slight S-turn, lines up with and descends to Runway 3 for landing (this is called *the final approach*). However, once the plane receives a clearance *to land*, the pilot may deviate from this pattern if he chooses because a landing clearance, being permissive in nature, confers authority on the pilot to proceed with a landing in such manner as his judgment dictates (X R. 2030–9). Accordingly, once a plane is cleared to land, tower personnel do not know precisely what path the pilot will follow.

there are other aircraft already in the pattern also awaiting landing clearance, the tower will assign a number to him indicating his sequence to land—but the assignment of a number does not itself constitute a clearance to land (VIII R. 1664); the plane is expected to continue flying around the airport in the pattern until its number is reached at which time the tower gives a specific clearance to land (X R. 2036).

c. *The facts.*—The following is an abbreviated summary of the facts as found by the district court and revealed by the evidence: Eastern's DC–4, 15 miles out of Washington en route from New York, contacted the tower while it was over Beltsville, Md., and at 11:38 A. M. received a clearance to enter the traffic pattern for landing on Runway 3 (I R. 21–2, 49–50). One minute before, Bridoux had taken off in the P–38 (a used plane recently purchased by the Bolivian Government) for a test flight (I R. 37).

Nine or ten minutes later, at 11:46–11:47 A. M., while both planes were south of the field on final approach for landing on Runway 3, and at an altitude of about 300 feet, the two planes collided (I R. 21, 49). Despite the extensive record made at the trial, the district court's findings and the opinion are entirely silent as to what occurred during this crucial nine or ten minutes. Indeed, apart from its conclusionary findings of negligence, the court made few findings beyond the facts which the parties had stipulated before trial.

This gap in the findings can be filled only by reference to the testimony:

Glenn D. Tigner, one of the seven air traffic controllers on duty in the tower,[12] testified that when the DC–4 requested landing instructions he cleared it to enter the traffic pattern and advised the pilot to contact him at a point closer to the field (VI R. 1277–8, VII R. 1346). A little later, when the DC–4 was still north of the field, it again contacted the tower, and Tigner cleared it to land on Runway 3 (VI R. 1278–9).

Shortly afterward, Tigner observed the P–38 at a high altitude, circling Alexandria, about 7 miles south of the airport (VI R. 1280, XI R. 2160–4). It was not flying in the traffic pattern (IX R. 1862–4, 1940). Tigner was then talking to another plane (VII R. 1561). An associate in the tower advised him the P–38 was requesting

[12] Because of the great amount of traffic at and near the airport, the controllers, although having specific assignments, of necessity work together as a team (I R. 207–8). The Washington National Airport, which is the only civil airport owned and operated by the United States, is the third or fourth busiest in the country. In 1949, there were in excess of 165,000 landings or take-offs, or an average of 450 per day, at the airport. *CAA Statistical Handbook on Civil Aviation*, p. 14, 21 (G. P. O., 1953). We are informed by CAA that during the busiest periods there have been 59 landings or take-offs per hour at the airport, and it is to be noted that it takes almost a full minute for a plane to move onto a runway, to accelerate and to take-off, and about the same time for a landing plane from the time it touches the ground until it leaves the runway. *CAA Staff Study: Washington Air Traffic Forecast*, pp. 41, 45 (Nov. 1950).

landing instructions (VI R. 1280–1). He called the P–38, but received no acknowledgment (*ibid.*, VIII R. 1613–4). He called again and, this time, on receiving an answer, he cleared the P–38 to enter the left *traffic pattern* for Runway 3, and instructed the pilot to report when he was on his downwind leg, west of the airport (VI R. 1281, 1303–4). The message was acknowledged. The P–38 was then 5 miles below the field, heading northwest, still circling toward the left (VII R. 1363).

When Tigner next saw the P–38, it was about five miles southwest of the airport at an altitude of approximately 4,000 feet, but now heading northeasterly with its gear down, and it was in a steep and rapid descent (VI R. 1281–2, XI 2160–5).[13] At about that time, the tower alerted Eastern's DC–4 to the presence of the P–38, and gave its position (I R. 89–92, 119–122). Observing the continued descent of the P–38, Tigner then called it and directed a 360 degree turn (so as to provide adequate space between the P–38 and the DC–4). He said, "Bolivian 927, make a 360 to your left. You are No. 2

[13] It could not then be determined that the P–38 was making a straight-in approach for landing, because the clearance given moments before *to enter the traffic pattern* would permit the P–38 to descend from 4,000 feet to 1,200 feet (which is the minimum altitude of the traffic pattern) while heading toward the airport (IX R. 1824, 1940–1). The fact that a plane's gear or flaps are down while flying in the pattern is neither unusual nor significant (VII R. 1511, IX R. 1946).

to land. Traffic is an Eastern DC–4, turning final ahead and below you" (VI R. 1282, 1304–5, 1310).[14] But the message was not acknowledged, nor did the plane comply with the instruction (VI R. 1282–3). Thinking that perhaps the Bolivian pilot did not know the meaning of the phrase "make a 360," Tigner then called, "Bolivian 927, turn left, turn left. You are No. 2 to land, following an Eastern DC–4 turning final ahead and below you" (VI R. 1283, 1308). But again there was neither an acknowledgment nor compliance (*ibid.*).

During these communications the DC–4 was on its base leg, roughly at a right angle to Runway 3, turning all the time from base leg into final approach (VI R. 1283).[15] When Tigner saw that the P–38 was not complying with his instructions, he called to the DC–4, "Eastern 537, make an immediate left turn. Traffic is P–38 above and

[14] An instruction from the tower that a plane is No. 2 to land does not constitute a *clearance to land*. It merely indicates the plane's number in the traffic sequence. See pp. 9–10, *supra*.

[15] After receiving its landing clearance, the DC–4 deviated from the prescribed landing pattern (see fn. 11, p. 9, *supra*). Instead of proceeding southward on downwind leg until below Alexandria, the DC–4 made a short approach, turning eastward onto the base leg while still north of Alexandria. There is no testimony to show that Eastern's pilots took any action to avoid the collision until the last moment, although from the description of their path of flight it seems clear that the P–38 could have been seen by the DC–4 pilots while on downwind and base legs.

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behind you" (VI R. 1284). The DC–4, which had gone only a quarter of a mile while actually on final approach (VI R. 1302), started to level off at once and began a slight left turn when the P–38 overtook it from above and behind, and struck it (VI R. 1284). The DC–4 broke in two; the forward part fell in the Potomac River, the after part on the Virginia shore.

Bridoux, the Bolivian pilot, gave a different version. He stated that shortly after his take-off one of his two engines gave trouble (II R. 397-402, III R. 491), that he reported this to the tower and requested landing instructions (II R. 406–7), that the tower responded, "Land 2 on Runway 3" (II R. 411). He understood this to mean that there was another plane ahead of him, but (mistakenly) he also understood this to constitute a clearance to land rather than merely a clearance to enter the traffic pattern (II R. 416–7, III R. 613–4). He said that while flying downwind he observed a plane (not the DC–4) making an approach for landing and assumed that that was the plane in the sequence ahead of him (II R. 425); he did not check with the tower to verify this. He testified to flying the prescribed landing pattern and that, while flying north, he again called the tower and advised that he was on final approach (II R. 431–3). He said the tower responded, "Bolivian P–38, prepare to land on Runway 3" (*id.*). He acknowledged, then put his flaps down, reduced his speed and began an S-turn

to line up with the runway (II R. 431–7). He then heard over the radio, "Clear to the left, clear to the left" (II R. 438). He thought the instruction was for someone on the ground (*id.*).[16] He did not turn left or take any other action. The collision occurred two or three seconds later (II R. 438–9).

d. *The decisions below.*—The district judge found that the collision occurred over the District of Columbia, that weather conditions were excellent, and that both planes were visible to the tower personnel who knew that the planes were on converging paths and had adequate opportunity to warn them (I R. 22, 50). He found that the air traffic controllers were negligent in clearing both planes for the same runway at approximately the same time, and in failing to warn and keep each plane apprised of the other's activities.[17] He found that this negligence "concurred

[16] Radio transmissions between the tower and the P–38 were on a military frequency. Different frequencies are used for messages between the tower and craft on the ground, and between the tower and commercial planes.

[17] Specifically, his finding was that the tower personnel were negligent in that, "*having in mind the respective positions of said planes in relation to each other and their speed of approach and descent:* (a) they failed to issue a timely warning to the Eastern plane concerning the P–38 being on final approach; (b) they failed to warn the P–38 that the Eastern plane was on final approach; (c) they cleared both planes for the same runway at approximately the same time; and (d) they failed to keep both planes advised of the activities of the other" (I R. 50–1 [emphasis added]). Although the trial judge based his ultimate

with the negligence of Eastern" in causing the accident (I R. 51, 45). Rejecting the Government's defense that claims of this type, based on regulatory and governmental acts, are not cognizable under the Tort Claims Act, he held that, when the Government assumed the responsibility of regulating air commerce and of regulating the flow of air traffic at a public airport, it also assumed a duty to protect the public from the hazards of such regulation, and that violation of that duty creates private rights actionable under the statute (I R. 44).

The Court of Appeals affirmed, but modified the award of damages. Acknowledging that the principal question is whether the United States is liable under the Act for negligence of its control tower employees in regulating air traffic (App. A, *infra,* p. 23a), the court held that the regulatory activity involved is not uniquely governmental, first, because there still are a number of control towers which have not been taken over by CAA, and second, because a private individual could establish an airport with a control tower, hence "when the United States entered the business * * * it assumed a role which might be and was assumed by private interests" (*id.,* p. 26a).

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findings of negligence on the italicized preliminary statement of fact, he never resolved the substantial conflict of evidence on those points nor made any findings concerning them. We believe his failure to do so constituted reversible error. See *e. g., Kelley* v. *Everglade District*, 319 U. S. 415, 420, 422; *Dalehite* v. *United States*, 346 U. S. 15, 24, fn. 8.

The court held that the discretionary function exception is not applicable because, it ruled, that section does not apply to discretionary acts "at the operational level"; the *Dalehite* opinion (346 U. S. 15), it said, indicates that the exception applies only to decisions "made at a policy-forming level" (App. A, *infra,* p. 33a). While characterizing the evidence of tower negligence in clearing both planes to land as "meager" and "only slight," it concluded there was adequate proof to support the findings (*id.,* p. 38a).

Finally, with one judge dissenting on this point, the court held that the Government's liability must be measured by the law of Virginia, rather than by District of Columbia law, because the Tort Claims Act, in express terms (28 U. S. C. 1346 (b)), requires application of the law of the place where the negligent "act or omission occurred"; that the negligent acts occurred in the tower in Virginia; and that application of Virginia law required modification of the judgment awarding $50,000 for the death of Ralph F. Miller by reduction to $15,000 (see fn. 3, *supra,* p. 4).

REASONS FOR GRANTING THE WRIT

1. This case presents questions paralleling those now before this Court in *Indian Towing Company* v. *United States,* No. 213, Oct. T. 1954, where, following an equal division (349 U. S. 902), a petition for rehearing was granted on May 6, 1955, and reargument was scheduled for this

Term, No. 8 (349 U. S. 926).[18] In both cases, the basic question is whether the United States is answerable under the Tort Claims Act for an allegedly negligent failure to accomplish a uniquely governmental objective—protecting and safeguarding those engaged in commerce. Put another way, the issues relate to the nature and scope of the so-called "governmental function" exclusion from the Act's coverage which was ruled on in *Dalehite* v. *United States,* 346 U. S. 15. There, the Court held that liability may not be imposed on the United States for damages resulting from the negligent performance of governmental duties. "Congress," the Court observed, "exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions" (346 U. S. at 32).

This governmental function exclusion, which constitutes one of the fundamental limitations upon the reach of the Act, has two textual supports, one marked out by Sections 2674 and 1346 (b) (App. B, *infra,* p. 52a) which limit the liability of the United States to that of a "private" person in "like circumstances," and the other, based on Section 2680 (a) (App. B, *infra,* p. 53a), which exempts claims arising from the perform-

[18] The petition for rehearing (at pp. 2–3) filed in *Indian Towing* made specific reference to the pendency of the instant cases to illustrate the importance of the question there involved.

ance of a "discretionary function." While not mutually exclusive, each branch gives content to the exclusion and protects the United States from claims affecting activities dominantly governmental in nature.[19]

In both *Indian Towing* and the present case, the claims rest on the misfunctioning of a warning system maintained by the Government as part of its public responsibility to promote safety in commerce, a responsibility which, we point out below, has no true private analogy and which, when defaulted, does not give rise to analogous private liability "under like circumstances." In *Indian Towing,* the petitioners' tug went aground allegedly because the Coast Guard failed to maintain a navigational aid (an unwatched lighthouse) erected and operated by the United States in keeping with its public duty to warn mariners of water hazards, so as to

[19] Thus, Sec. 2674 has been held to bar claims arising out of negligent fire fighting (*Dalehite* v. *United States*, 346 U. S. 15, 42–44); negligent weather forecasting (*National Mfg. Co.* v. *United States*, 210 F. 2d 263, 277 (C. A. 8), certiorari denied, 347 U. S. 967); negligent maintenance of a prison (*Sigmon* v. *United States*, 110 F. Supp. 906 (W. D. Va.)); and see *Feres* v. *United States*, 340 U. S. 135, 141–2. Sec. 2680 (a) has been held to bar claims arising out of negligent failure to prevent a theft (*Goodwill Industries of El Paso* v. *United States*, 218 F. 2d 270, 272 (C. A. 5)); negligent supervision of a prisoner (*Morton* v. *United States*, C. A. D. C., June 9, 1955); improper conduct of an SEC investigation (*Schmidt* v. *United States*, 198 F. 2d 32 (C. A. 7), certiorari denied, 344 U. S. 896. See, also, *infra*, p. 33.

promote safety at sea. In this case, respondents suffered detriment allegedly because of the misfunctioning of a navigational aid (a control tower) erected and operated by the United States in keeping with its public duty to warn pilots of conditions around an airport, also for the end of promoting safety in commerce.

In *Indian Towing,* the Fifth Circuit held that a claim of this kind—arising from the failure of the Government to fulfill its public navigational responsibilities—is not cognizable under the Tort Claims Act. Here, the District of Columbia Circuit held that it is. The two cases are in substantial conflict, and if the Court should affirm in *Indian Towing* this case should be before the Court so that the ultimate decision herein would conform to the ruling there made. Moreover, a reversal in *Indian Towing* will not necessarily be dispositive of the present case because here there is the additional, highly significant, factor that it is not merely the function of the control tower to *warn* aircraft, but it is also the responsibility of the air traffic controllers to *regulate* and *control* aircraft in flight. Both courts below, acknowledging that the accident occurred while the tower was in the act of regulating air traffic, held that a failure to use due care in such regulation creates private rights under the Tort Claims Act. *Indian Towing* does not involve this important question of whether the United States is answerable in tort for negligent *regulation.* See *infra,*

pp. 22–28, 32–37. Similarly, this case, unlike *Indian Towing,* poses the problem of whether the "discretionary function or duty" to which Section 2680 (a) refers is confined to high level policy determinations, or covers acts of public judgment without regard to the echelon of the employee exercising the discretion. See *infra,* pp. 30–35.

These issues are of far-reaching importance, as the Court has already recognized by granting review and ordering reargument in *Indian Towing.* This is a test case controlling scores of other pending suits. *Supra,* p. 3. But even more, the principles announced below affect directly all "operational level" regulation of air commerce under the Civil Aeronautics Act and, indirectly but no less immediately, almost all regulatory and law enforcement activity of the Government. We have urged throughout the country, with some success (see fn. 19), that claims based upon the improper functioning of activities such as those here and in *Indian Towing*—characteristically governmental in nature—are excluded from the coverage of the Tort Claims Act under Sections 2674 and 2680 (a).[20] The decision below

[20] Typical of these cases is the extensive litigation arising out of an explosion which occurred at South Amboy, N. J., in 1950, when lighters were being loaded with explosives manufactured and transported by private firms for sale to a foreign country. 31 persons were killed; more than 12,000 persons asserted property damage claims. The gravamen of the complaints against the United States is that a Coast

flatly rejects that thesis, despite the teaching of the *Dalehite* decision, and thus leaves it to this Court to furnish the further guidance which is now all the more necessary.

2. (a) The first branch of the governmental function exclusion (Secs. 2674 and 1346 (b)) specifies that the only liability assumed by the United States is that which a "private individual" or a "private person" would have "under like circumstances." There can be no liability under the Act if the claim cannot be analogized to one which would give rise to private liability. *Feres* v. *United States,* 340 U. S. 135, 141–142; *Dalehite* v. *United States,* 346 U. S. 15, 42–44. Where, as here, the essence of the claim is the failure to perform, or the negligent performance of, a characteristically public duty, no such analogy can properly be drawn. If the gist of the claim is loss suffered by reason of negligence of the Weather Bureau in issuing erroneous warnings concerning a hurricane, or carelessness of the FBI in failing to recover stolen funds, or negligence of the SEC in not preventing a stock fraud, there can be no recovery under the Act because the complaint would not meet "the test of allowable claims," which is, that there be private liability

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Guardsman on the scene negligently failed to discover violations of, and to enforce compliance with, safety regulations. The district court has held the claim cognizable under the Act. *Pennsylvania R. R. Co.* v. *United States*, 124 F. Supp. 52 (D. N. J.). The cases are awaiting trial.

"under like circumstances" (*Feres, supra,* 340 U. S. at 141). The claims would be based upon the failure to perform functions or to achieve objectives peculiarly and historically within the province of government, and there can be no private counterpart in such circumstances.[12]

Where this kind of claim is presented, it is unnecessary to look beyond Section 2674 to find that recovery is barred, even though the challenged conduct may also be within the classical meaning of the words "discretionary function" as used in Section 2680 (a) (*infra,* pp. 30–37). This Court has again and again stressed that the Tort Claims Act permits suit only on "recognized

[12] Cf. fn. 19, *supra,* p. 19. As our brief in *Indian Towing* points out, we do not, of course, contend that all conduct tending to promote a uniquely governmental objective is excluded from the Act's coverage. The exclusion does apply, however, when the essence of the particular claim is the negligent failure *to attain* that objective. We adhere to the distinction drawn by the Congressional committees explaining the exclusion of claims based on regulatory activities (*infra,* pp. 35–37). Thus, a claimant is not barred from recovery in the routine case of a collision with a CAA truck carrying CAA's mail. The gravamen of such a complaint would not be that the particular agency negligently performed its uniquely governmental function (regulation of air commerce). So far as that complainant is concerned, whether or not the agency attained its objective (proper regulation of commerce) would be wholly irrelevant to his claim. He is damaged by the CAA's negligent performance of the intermediate step of driving a truck (an activity which has its private parallel). The Tort Claims Act was intended to permit such a suit, but not where, as here, the gist of the claim is alleged negligence in the performance of the governmental activity itself (regulation of air commerce).

causes of action" and does not "visit the Government with novel and unprecedented liabilities" (*Feres* v. *United States,* 340 U. S. 135, 142; *Dalehite* v. *United States,* 346 U. S. 15, 43–44; *United States* v. *Brown,* 348 U. S. 110, 112–113). The Act permits recovery only where there is "an established type of liability" (*United States* v. *Gilman,* 347 U. S. 507, 509); it does not create new rights (*Dalehite,* 346 U. S. at 43; *Feres,* 340 U. S. at 142). And there is no liability in American law for the failure of a government to fulfill efficiently its uniquely public responsibilities. It is almost an universal rule in this country that, absent specific legislative mandate, the negligent performance of, or the failure to perform, governmental duties relating to the protection, safety, and health of the community give rise to no private actionable claim.[22] See also *infra,* pp. 30–31. More than 30 years ago, this Court, speaking through Mr. Justice Brandeis, held that the fundamental obstacle to recovery in such situations is not the immunity of the

[22] E. g., *Wolff* v. *District of Columbia,* 196 U. S. 152, 157 (failure to ligl. streets); *Mead* v. *City of New Haven,* 40 Conn. 72 (negligent inspection of steam boiler); *Rhodes* v. *Kansas City,* 167 Kan. 719, 208 P. 2d 275 (negligent fire fighting); *Young* v. *State of New York,* 278 App. Div. 997, 105 N. Y. S. 2d 657, affirmed, 304 N. Y. 677, 107 N. E. 2d 594 (negligent supervision of bridge scaffolding); *The Nez Perce Tribe of Indians* v. *United States,* 95 C. Cls. 1, 9–11, certiorari denied, 316 U. S. 686 (failure to prevent removal of gold from land).

sovereign to suit, but the lack of a substantive right to recover damages resulting from the failure of the Government to perform its public functions carefully, and that therefore, even when a statute waives immunity, such a claim is not actionable unless the act creates a new substantive right. *Turner* v. *United States,* 248 U. S. 354, 358; and see *German Alliance Ins. Co.* v. *Home Water Co.,* 226 U. S. 220, 227–8, 230–1.

(b) The court below sought to avoid the barrier of Section 2674 by holding that the regulation of air commerce by the United States does have a proper private analogy. But we have already shown the intensive supervision exercised by the federal government over air commerce (*supra,* pp. 5–10). The control tower is the nub of CAA's extensive network of regulation and control of air traffic. Its function is regulation in the most direct manner provided under the Civil Aeronautics Act. The directions which the air traffic controller gives to aircraft carry the binding authority of law. His affirmative instructions (as distinguished from clearances which are only permissive in nature) must be obeyed; failure or refusal to obey may result in penalties and other sanctions (*supra,* p. 7). In that sense, his oral directions are of the same legal quality as the written regulations themselves. No private person has this characteristically governmental

power of regulation and control.[23] In fact, any unauthorized interference with air navigation by a private individual is expressly forbidden and is punishable by fine and imprisonment (49 U. S. C. 622 (c)).

In ruling that there is a private analogy to CAA's regulation of air commerce the court below relies on the fact that there still are a number of control towers which CAA has not yet taken over for operation (see fn. 6, *supra*, pp. 6–7); it then assumes that these towers "perform no governmental function," and further assumes that the owners of such towers would be liable for negligent operation (App. A, *infra*, p. 26a).

But such "private" towers cannot be analogized to an attendant at a private parking lot the owner of which would be liable for the attendant's misdirection of traffic. The "private" towers can be operated only by persons examined and certificated by CAA,[24] with equipment approved by CAA,[25] and pursuant to procedures and techniques set out in regulations promulgated by CAA.[26] Their

[23] Even the dissent in *Dalehite* agreed that when a government "official exerts governmental authority in a manner which legally binds one or many, he is acting in a way in which no private person could," and the governmental function exclusion applies. 346 U. S. at 59.

[24] See 49 U. S. C. 401 (6); *id.* 560 (a) (2); and 14 C. F. R. Part 26.

[25] A certificated controller is prohibited from controlling air traffic with facilities which CAA has determined to be inadequate. 14 C. F. R. 26.31.

[26] 14 C. F. R. 617.3; 14 Fed. Reg. p. 3328, § 26.50–2.

commands must be obeyed just as in the case of CCA towers. The primary reason why CAA does not operate these towers itself is because the particular airports do not have sufficient public traffic to warrant it. See fn. 6, *supra,* pp. 6–7. What CAA has done in effect is to delegate its authority in these circumstances to designated persons to regulate air traffic. This does not alter the dominantly governmental nature of the activity for, essentially, these "private" towers are then an arm of CAA.[27] The "private" air traffic controller who operates such a tower is analogous to a special policeman who derives his authority from the government and who, when performing his public functions, has the same privileges and immunities as a public official. See *Labor Board* v. *Jones & Laughlin Co.,* 331 U. S. 416, 429, 431. He acts in the dual capacity of public officer and private employee; if he is negligent in his public duties, as distinguished from acts performed as a private servant, his employer would not be subject to liability. *McKain* v. *B. & O. R. Co.,* 65 W. Va. 233, 64 S. E. 18; *Sey-*

[27] No private airport operator himself, as distinguished from the CAA tower, has the power today to regulate and control civil aircraft in air commerce, not even within the designated control zone above and surrounding his airport, for all navigable air space has been placed in the public domain and is subject to exclusive federal control. 49 U. S. C. 180; cf. *United States* v. *Causby,* 328 U. S. 256; and see *supra,* pp. 5–10.

moure v. *Director General,* 290 Fed. 291 (C. A. D. C.).[28]

(c) Implicit in the decision below is the view that the Section 2674 aspect of the governmental function exclusion applies only when the activity has no possible parallel whatsoever in private affairs. Such a restrictive interpretation of the exclusion goes far toward nullifyng the exemption, since there are few governmental activities without some remote private counterpart. The public police have equivalents in private police or detective agencies, such as the railroad police; certain of the services of the Weather Bureau are duplicated by private forecasting organizations; public licensing of businesses or trades has an analogy in the granting by large realty developments of concessions and conditional operating permits; public sanitary inspections have similar private counterparts; even the functions of the legislature have a rough parallel in a corporation's power to adopt by-laws or rules governing employees, etc. But as this Court has twice de-

[28] It is extremely doubtful that when the "private" traffic controller regulates public traffic, through the authority delegated to him by CAA, such a *respondeat superior* relationship exists with his employer, as to this activity, as would result in vicarious liability. Such liability rests upon the employer's right to control his servant's conduct; it is clear that he cannot exercise control over the tower operator's conduct in regulating air commerce because that conduct is governed exclusively by CAA regulations.

clared, "the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create" (*Feres,* 340 U. S. at 142; *Dalehite,* 346 U. S. at 43), and the significant circumstances would be those characterizing the particular activity in our society as, on the one hand, historically and dominantly public, or, on the other, as basically private.[20]

In the present case, the Court of Appeals ignored this Court's admonition to look to *all* the circumstances. The functioning of the control tower is vital and integral to the over-all regulation of aeronautics by the federal government, and it is closely akin to the control of the other routes of commerce which the federal government has carried on since the beginning of the nation. There can be no true private parallel to such a regulatory activity. Perhaps the closest analogy is the role of municipal and state police officers who control traffic on the highways. There is a great body of case law holding that, because that activity is governmental, states and municipalities are not liable for negligence in

[20] In *Feres,* injuries to soldiers were caused by malpractice and by an inadequate heating device, circumstances which clearly give rise to private liability. But this Court went on to examine, and give controlling effect to, the additional circumstances present which, when considered as a whole, revealed that the negligent acts arose out of activities undertaken in a special governmental context.

the regulation of traffic.[30] The decision below by-passes these cases, despite this Court's specific indication that cases of that type are controlling in determining whether the activity is to be regarded as basically governmental and therefore exempt. *Dalehite,* 346 U. S. at 44.

3. The second branch of the Act's governmental function exclusion, Section 2680 (a), bars recovery for governmental conduct traditionally characterized as "discretionary," as well as for other activities involving discretion even though they are fully comparable to those carried on by private persons. The words "discretionary function" constitute a long-familiar formula in the jurisprudence holding state and municipal governments, and their employees, free from liability for negligent mistakes in judgment in connection with public activities designed to secure the safety, health, and well being of the community.[31]

[30] The cases are legion. Only a few will be mentioned: *Ferrier* v. *City of White Plains*, 262 App. Div. 94, 28 N. Y. S. 2d 218, leave to appeal denied, 287 N. Y. 852 (policeman misdirected auto); *Dorminey* v. *Montgomery*, 232 Ala. 47, 166 So. 689 (negligent maintenance of traffic light); *Powell* v. *Nashville*, 167 Tenn. 334, 69 S. W. 2d 894 (negligence re stop sign); *Doughty* v. *Phila. Rapid Transit Co.*, 321 Pa. 136, 184 A. 93 (negligent regulation of one-way street); *Roberson* v. *District of Columbia*, 86 A. 2d 536 (D. C. Mun. Ct. of App.) (negligent regulation of vehicles on sidewalks).

[31] "[I]f the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discre-

And these state and municipal cases have not drawn any definitive distinction between "policy level" and "operational level" activities. Thus local governments have been held immune from suit for negligence in connection with fire fighting,[32] health and safety measures,[33] or traffic control,[34] even though the negligence was by so-called operational level officials.

Nevertheless, the court below read the *Dalehite* case as holding that only "policy level" determinations are excluded by Section 2680 (a). In *Dalehite,* this Court stated that the discretion protected by the exception is the discretion of the executive or administrative official "to act according to one's judgment of the best course," and that, "Where there is room for policy judgment and decision there is discretion" (346 U. S. at 34, 36), but it did *not* limit the exemption merely to high level policy judgment and deny it to discretionary acts at the "operational level." On the contrary, after holding that the words cover "Not only agencies of government * * * but *all* employees exercising discretion" (346 U. S. at

tion * * *." *Cooper* v. *O'Connor*, 99 F. 2d 135, 138 (C. A. D. C.), certiorari denied, 305 U. S. 643.

[32] *Rhodes* v. *Kansas City*, 167 Kan. 719, *supra*, fn. 22; *Fisher* v. *City of Boston*, 104 Mass. 87.

[33] *Mead* v. *City of New Haven*, 40 Conn. 72, *supra*, fn. 22; *Young* v. *State of New York*, 278 App. Div. 997, 105 N. Y. S. 2d 657, *supra*, fn. 22.

[34] *Ferrier* v. *City of White Plains*, 262 App. Div. 94, 28 N. Y. S. 2d 218, *supra*, fn. 30.

33; emphasis added), the Court set out verbatim the plaintiffs' argument on that very point, and then declined to accept the limitation, saying that, "It is unnecessary to define, apart from this case, precisely where discretion ends" (346 U. S. at 35). At the very least, then, the decision below passes on a question this Court expressly left open in *Dalehite.*

Indeed, if there be ambiguity in the portions of the *Dalehite* opinion just referred to, that ambiguity was later resolved against the views of the court below. For, in the Coast Guard portion of the *Dalehite* opinion (*id.*, 42–44), this Court held that claims arising from negligence of the Coast Guard in failing to supervise the storage of the FGAN, in not enforcing existing safety regulations, and in fighting the fire, were not actionable.[35] Plainly, supervising stowage, enforcing regulations, and fire fighting are "operational level" activities, and were not the result of decisions at "a policy-forming level" as the court below mistakenly declared (App. A, *infra,* p. 33a).

By confining the discretionary function exception to "policy level" decisions, the court below has seriously constricted its scope. The truth is

[35] The Court specifically mentioned that such claims are barred under Sec. 2674, because of the absence of analogous private liability in like circumstances. The court below erroneously thought that the Coast Guard aspect of *Dalehite* rests wholly on the discretionary function exception (App. A, *infra*, p. 33a).

that it is not the official's level or echelon which determines the applicability of the exception; rather, it is the discretionary nature of the act or function itself—whether "discretionary" be taken in the special sense it has acquired in the American law of public liability or in its more general connotation of "involving judgment." There are numerous decisions holding claims barred under the discretionary function exception where it would be ludicrous to say that a policy-forming determination was involved, all of which must be regarded as in conflict on this point.[36]

[36] Thus, the failure of federal law enforcement officers to prevent a theft is negligence at the operational level, but has been held within the discretionary function exception. *Goodwill Industries of El Paso* v. *United States*, 218 F. 2d 270, 272 (C. A. 5). Similarly, the release of a mental patient from a hospital is an operational level decision but within the bar of the Section, *Smart* v. *United States*, 207 F. 2d 841, 842–3 (C. A. 10); so, too, is the release of waters from a dam, *Olson* v. *United States*, 93 F. Supp. 150 (D. N. D.); *Lauterbach* v. *United States*, 95 F. Supp. 479 (W. D. Wash.) (both cited with approval in *Dalehite*, 346 U. S. at fn. 32, p. 37); also, the manner in which a particular prisoner is confined or fed, *Morton* v. *United States* (C. A. D. C., June 9, 1955). A licensing official who improperly fails to grant a license is an operating level employee applying previously promulgated standards, but the resultant claim is not actionable. Cf. *Chournos* v. *United States*, 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977 (Sec. 2680 (a) applicable to denial of grazing permit); *Matreychuk* v. *United States*, 195 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 845 (Sec. 2680 (a) applicable to OPA denial of rent increase). See also, *Schmidt* v. *United States*, 198 F. 2d 32 (C. A. 7), certiorari

In the present case, whatever level be ascribed to the air traffic controller, his alleged acts of negligence were "discretionary" in every sense. The nature of the information, clearances, and instructions which a control tower gives to a pilot is largely left to the informed judgment of the controller, who must deal with a situation which may change radically from moment to moment. Significant utterances here were oral CAA regulations, authorized by written CAA regulations, *requiring* the pilots to take specified action. See *supra,* pp. 7–8.[37] This type of

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denied, 344 U. S. 896 (improper conduct of SEC investigation).

In cases such as *Johnston* v. *District of Columbia*, 118 U. S. 19, *Costley* v. *United States*, 181 F. 2d 723 (C. A. 5), and *United States* v. *Gray*, 199 F. 2d 239 (C. A. 10), relied on by the court below, where the discretionary function doctrine was held inapplicable, the acts which caused the damage were not themselves discretionary; these acts had been preceded by discretionary conduct, but the discretion was spent before the wrongful conduct occurred and had no proximate relationship to the tort.

[37] Many airfields do not have control towers. At such terminals, pilots land, take-off and space themselves by visual reference in accordance with applicable air traffic regulations. 14 C. F. R. Pt. 60. It is hardly conceivable that the United States could be held liable in tort for a collision resulting from a pilot's adherence to an inadequate air traffic regulation. Clearly, the same result should follow when the written regulation is replaced by the spoken voice from a control tower. CAA was under no obligation to construct and operate the tower, "and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was no more responsible for failure in that re-

conduct seems to us to fall squarely within the core of Section 2680 (a); it is regulatory in aspect and calls for the exercise of true judgment and discretion in the carrying out of a purely governmental undertaking.[38]

4. It is clear from the legislative history of the Tort Claims Act that Congress specifically intended to exclude from its coverage claims based upon the regulatory activities of the Government, even when negligently performed. Various of

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spect than it would have been for failure to furnish adequate police protection" at the airport (cf. *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 227–8).

[38] The few cases involving liability for negligence of airport control towers have reached divergent results. Compare *Georger, Admx.* v. *United States*, 1949 U. S. Aviation Rep. 113, 114 (E. D. Va.) (liability for tower negligence barred by discretionary function exclusion) with *Marino* v. *United States*, 84 F. Supp. 721 (E. D. N. Y.) (liability imposed, but governmental and discretionary function defenses were not raised). See also *Finfera* v. *Thomas*, 119 F. 2d 28 (C. A. 6) (prior to Civil Aeronautics Act, city not liable for tower defection).

In the courts below, respondents relied upon a number of cases holding a municipality liable for a collision between a plane and some obstruction at its airport. There, liability was based on the ground that the proprietor of an airport, like any occupant of land, owes a duty to business invitees to provide safe premises Neither court below relied on these cases. The fact that the accident occurred at the National Airport, the only public airport operated by the United States, is a fortuitous and irrelevant circumstance to the legal issues involved here. Whatever "housekeeping" duties the Government may have as an airport owner, the regulation of air traffic throughout the nation by CAA operated towers is a separate and distinct function, in no way connected with ownership of the particular airports. See *supra*, pp. 6–8, 26–28.

the earlier proposed tort claims bills had exemptions relating to specifically designated spheres of regulatory activity. There were, for example, provisions exempting claims arising from the activities of the Federal Trade Commission and of the Securities and Exchange Commission.[39] These specific exemptions were deleted and more general language was substituted in order to give the exclusion much wider scope; subsequently, Congressional committees reporting on the revised bills (which ultimately became the Act) stated time and again that, although it was intended to permit recovery on claims arising from the ordinary common law torts of employees of regulatory agencies, such as a claim based upon a collision with a regulatory agency's vehicle, the Act was designed to exclude claims based on the regulatory activities of those agencies. See the reports cited and quoted in *Dalehite* v. *United States,* 346 U. S. 15, at fn. 21, p. 29.[40]

[39] *E. g.*, sec. 303 (7) of S. 2690, 76th Cong., 1st Sess.; sec. 303 (7) of H. R. 5299, 77th Cong., 1st Sess.

[40] Mention of specific regulatory agencies was deleted during the 77th Congress when the discretionary function exception (now in 28 U. S. C. 2680 (a)) was inserted. Explaining the revision, a Committee memorandum stated, "Since the language used * * * exempts from the act claims against Federal agencies *growing out of their regulatory activities*, it is not necessary to except such agencies * * * by name * * *. However, the present bill is intended * * * to cover claims for common-law torts, such as those involving a motor-vehicle collison, against the Federal Trade Commission, the Securities and Exchange Commission, and other regulatory

The exclusion of claims based upon asserted negligence in the performance of purely regulatory activities is, as we have pointed out above, but one aspect of the broader exclusion from the statute of claims based upon the performance of acts of a uniquely governmental nature. "The legislative history indicates," this Court said after extensively reviewing that history, "that * * * it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function." *Ibid.*, at pp. 27–28. The decision below ignores this legislative history and effectively thwarts the Congressional purpose, reaching a result contradictory to both.[41]

agencies." Memorandum for the Use of the Committee on the Judiciary, H. of Rep., 77th Cong., 2d Sess., Explanatory of Committee Print of H. R. 5373 (Jan. 1942), p. 8 [emphasis added].

[41] Insofar as the present case imposes liability on the United States for failure to give appropriate warnings to each plane concerning traffic hazards, it also conflicts in principle with the decisions of the Eighth and Ninth Circuits in *National Mfg. Co.* v. *United States*, *supra* (210 F. 2d at 275–6), and *Clark* v. *United States*, 218 F. 2d 446, 452, both holding that the Act excludes claims arising from erroneous warnings concerning the dangers of floods. Apart from the governmental function exclusion, such claims are barred by the negligent misrepresentation exclusion of Sec. 2680 (h) (App. B. *infra*, p. 53a).

CONCLUSION

For the above reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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AUGUST 1955.

APPENDICES

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

Nos. 11991 and 11992

EASTERN AIR LINES, INC., APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

Nos. 12017 and 12018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided February 8, 1955

Mr. Joseph W. Henderson, with whom *Mr. Richard W. Galiher* and *Mr. John M. Aherne,* of the bar of the Supreme Court of New York, were on the brief, for appellant in Nos. 11991 and 11992.

Mr. Lester S. Jayson, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Messrs. Leo A. Rover,* United States Attorney, *Paul A. Sweeney,* Attorney, Department of Justice, and *D. G. Galotta,* Attorney, Civil Aeronautics Administration, were on the brief, for appellants in Nos. 12017 and 12018. *Mr. Lewis A. Carroll,* Assistant United States

Attorney, entered an appearance for appellants in Nos. 12017 and 12018.

Mr. David G. Bress, with whom *Messrs. Sheldon E. Bernstein, Alvin L. Newmyer* and *Jo V. Morgan, Jr.,* were on the brief, for appellees in all cases.

Before EDGERTON, WILBUR K. MILLER and [illegible]AHY, Circuit Judges

WILBUR K. MILLER, *Circuit Judge:* On the morning of November 1, 1949, an Eastern Air Lines DC–4 plane was flying from New York to Washington, carrying fifty-one passengers and a crew of four. When it was on final approach for landing on runway 3 at the Washington National Airport and at an altitude of about 300 feet, the airliner was struck from above and behind by a P–38 military-type aircraft just purchased by the Bolivian Government, which was being tested by a Bolivian military pilot, Eric Bridoux, who was its only occupant. The DC–4 was cut in two. The forward part fell in the Potomac River, the after portion on the Virginia shore. All fifty-five persons aboard were killed. The P–38, badly damaged, of course, plunged into the river but somehow Bridoux escaped from the cockpit. He was rescued and, despite serious injuries, survived.

These suits were brought in the United States District Court for the District of Columbia, by the Union Trust Company and Melville W. Stuart as the executors of Ralph F. Miller and Mildred E. Miller, his wife, who were passengers on the DC–4. Eastern Air Lines, Inc., and Eric Bridoux were named as defendants in two of the

actions and the United States was the defendant in the other two.[1] Many similar suits filed on behalf of the estates of others who died in the fatal crash are pending under an agreement that the determination of liability in these cases shall govern their disposition.[2]

Although the two captioned cases against Bridoux and Eastern were tried to a jury, and the two against the Government to the court, by agreement of the parties all four actions were tried simultaneously. The jury found Bridoux not "liable," but found against Eastern Air Lines in the sum of $50,000 for the estate of Ralph F. Miller and in the sum of $15,000 for the estate of his wife. In the Federal Tort Claims actions against the United States, the trial judge held the Government liable to the estates and fixed the damages at $50,000 and $15,000 respectively. Eastern Air Lines and the United States appeal.

I

We first summarize the factual background which is essential to an understanding of the reasons for reversal advanced by the appellants.

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[1] Aubin & Lyons, t/a Universal Marine and Supply Company, were also named as defendants on the theory they owned or had some interest in the P–38. They were dismissed when it appeared that title to the plane had passed to the Bolivian Government.

[2] It was also agreed that the determination of the situs of the accident (whether it occurred over the Potomac River, which is in the District of Columbia, or over land in Virginia), made in these cases, shall be binding in all the others. The situs is important because a Virginia statute limits recovery for wrongful death to $15,000. In the District of Columbia there is no statutory limit.

The Washington National is a controlled airport; that is to say, from a glass-enclosed observation platform in a control tower standing above and west of runway 3, employees of the Civil Aeronautics Administration observe arriving and departing planes and direct their movements by radio. An incoming plane may not land and a departing plane may not take off until it receives tower permission to do so.

The Administrator of Civil Aeronautics adopted, and published in the Federal Register October 14, 1949 [14 Fed. Reg. 6247–6250], a regulation for the administration of the Washington National, which is a civilian airport owned by the United States. Section 570.55 (c) of the regulation is as follows:

> (c) Aircraft landing or taking off shall conform to the air traffic pattern as published jointly in the Airman's Guide by the Anacostia Naval Air Station, Bolling Field and the Washington National Airport.

The air traffic pattern referred to is a map of the airport and vicinity, with lines drawn over it intended to show the general flight patterns for taking off from and landing on the various runways. For landing on runway 3, it shows a southward pattern to a point south of Alexandria (the downwind leg), then an east turn until over the Potomac River (the base leg), then northwardly over the river to a point a short distance northeast of Alexandria, where it curves to the left over the Potomac Yards, and then a curve to the right in a line for a straight approach to runway 3. The drawing itself was published in

the Airman's Guide March 1, 1949, but was not published in the Federal Register until August 7, 1952, long after the accident here involved. The regulation published October 14, 1949, referred to but did not include the traffic pattern.

Over Eastern Air Lines' vehement objection, the trial court admitted the traffic pattern when it was offered in evidence by the appellees, and charged the jury that it was a binding Federal regulation, and that an unauthorized deviation therefrom would be negligence *per se*. Eastern admittedly had knowledge of the pattern.

On the morning of the accident Glenn D. Tigner, one of the seven traffic control operators who were working in the tower, was advised by the Eastern DC–4 at about 11:38 a. m. that it was over Beltsville, Maryland, 15 miles northeast of the airport, and was asked for landing instructions. Tigner authorized it to enter a left traffic pattern for landing on runway 3 and advised the pilot to contact the tower again from a point closer to the airport. Tigner testified that in a second communication, when the Eastern plane was still north of the airport, he cleared it to land on runway 3.[3] He fixed the time of the

[3] The Administrator of Civil Aeronautics was called by the court as a witness on the meaning of the phrase "cleared to land." He testified that when a plane in the traffic pattern of an airport is "cleared to land," the pilot of the plane is thereby authorized to commence his landing approach operation immediately; in other words, when a pilot receives that clearance, wherever he may be in the traffic pattern, there is no plane ahead of him and he may make his turn at his discretion and consistently with the safe management of his plane, and may come in and land at once on the runway which has been designated by the tower.

clearance as approximately 11:44 a. m. The DC–4 continued its flight and entered the traffic pattern as it had been directed to do. It had circled from the pattern and was on a final approach for runway 3 when it was struck by the Bolivian plane.

The Bolivian P–38 had taken off from runway 3 at 11:37 a. m. and therefore had been in the air only between nine and ten minutes when the collision occurred. Shortly after he had cleared the DC–4 to land, Tigner observed the P–38 at a high altitude, circling Alexandria about seven miles south of the airport, heading toward the east and starting a turn to its left. Tigner was then talking to another plane. He was informed by a tower colleague the P–38 was requesting landing instructions. He saw it continuing its left turn and said by radio, "Bolivian 927, did you request landing instructions?" Bridoux replied he had done so, whereupon Tigner told him he was cleared to enter the left traffic pattern for runway 3 and asked him to report on his downwing leg west of the airport.

Tigner said when he next saw the P–38 it was about five miles southwest of the airport at about 4,000 feet heading northeastwardly with its gear down and in a steep and rapid descent. At 11:45 a. m. he warned the DC–4 that the P–38 was in traffic. He said to the P–38 "Bolivian 927, make a 360 to your left. You are No. 2 to land. Traffic

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That this is the only meaning of the phrase "cleared to land" was the unanimous testimony of all the certified air traffic controllers who testified on the subject. The trial judge instructed the jury as a matter of law that such was the meaning of the phrase "cleared to land."

is an Eastern DC–4, turning final ahead and below you." Bridoux did not acknowledge the message and did not turn as directed. Tigner then called, "Bolivian 927, turn left, turn left. You are No. 2 to land, following an Eastern DC–4 turning final ahead and below you." Bridoux did not acknowledge or comply.

During these transmissions the DC–4 was on its base leg turning into final approach. When Tigner saw the P–38 was not complying with his instructions, he called the DC–4 and said, "Eastern 537, make an immediate left turn. Traffic is P–38 above and behind you." The DC–4, which had gone only about a quarter of a mile on final approach, responded with a surge of power into a left turn. As it did so, the Bolivian plane struck it.

Bridoux testified that a minute after his takeoff he began to have engine trouble. He reported that fact to the tower and requested landing instructions. Receiving no answer, he repeated his request and the tower said, "Land 2 on Runway 3," which he understood to mean there was another plane ahead of him behind which he was to land. He testified he also understood this message to constitute a clearance to land rather than merely clearance to enter the traffic pattern.

When he was about two miles west of the airport descending at a rate of 500 to 600 feet a minute, Bridoux said he saw a plane making a final approach for a landing either on runway 36 or 3, which was either a Beechcraft C–45 or a Lockheed C–60. He said, "* * * I realized that that was the reason I was No. 2 to land." He continued flying south until he was about five or six miles south of the field and then made a 90-

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degree left turn. As he did so, he observed the Lockheed or Beechcraft on the ground taxiing toward the buildings. He had not seen it actually land.

Having been told by the tower he was No. 2 to land on runway 3 and having seen, as he thought, that the plane which was No. 1 to land on that runway had already done so and had taxied away, Bridoux concluded it was unnecessary for him to check with the tower to learn whether the plane ahead of him had landed. We reproduce in the margin[4] his testimony that he regarded the

[4] "Q. As a matter of fact, at that point you not only accepted that clearance which you told us was given, but you made another complete 360-degree turn around the airport; and then after you had done that, you started downwind leg five or six miles.—A. Because I was No. 2 to land, sir.

"Q. You at no time, Captain, asked the identity of the plane that was ahead of you, did you Captain?—A. No, sir.

"Q. And you had no way of knowing, based upon information from the tower, that that plane was ahead of you, did you, Captain?—A. Unless I see.

"Q. And you didn't see it.—A. I saw it on final approach, the C-45 or C-60.

"Q. What you are telling us is after getting that clearance, you assumed the plane you saw was the one they meant was ahead of you?—A. Yes, sir.

"Q. But you didn't check with the tower to see if that was the plane?—A. Why have I got to check, if I am seeing?

"Q. I am not asking you why. I am simply asking you if it isn't a fact that you didn't check back with the tower to see if that plane you saw was the one ahead of you.—A. It isn't necessary, because I was seeing the airplane.

"Q. Would you please answer yes or no to my question? You didn't check back with the tower to see if that plane you told us you noticed on final approach was the one ahead of you, did you?—A. When I was on final approach, I called the tower.

tower's statement, "You are No. 2 to land on runway 3," as absolute clearance to land after he had decided for himself, without further communication with or from the tower, that the No. 1 plane was out of the way.

"Q. Captain, I am asking you, sir, if after you saw that plane, which you said seemed to be lined up for landing, which seemed to be on approach for landing on runway 3, did you at any time thereafter ask the tower if that was the plane that had been ahead of you?—A. No, I didn't ask. It wasn't necessary to.

"Q. You did not ask the tower——A. Because it wasn't necessary. I was seeing the airplane. I was watching it.

"Q. What you mean is you saw a plane.—A. Yes, sir.

"Q. You have no way of knowing whether that one was the one the tower was referring to, or some other plane, have you, Captain?—A. There was a way, because he was on final approach. If he didn't land yet, I understand he is No. 1.

"Q. Isn't it a fact that from that point on there was a lapse of four or five minutes before you came in, on your own final approach?—A. More or less.

"Q. And you never contacted the tower to find out where the plane that was No. 1 was, did you?—A. I called on final approach, advising them I was on final, and they could tell me anything at that time, in order to realize that.

"Q. That was after you had lined up for runway 3, wasn't it?—A. No, sir.

"Q. You said you were on final approach.—A. On final; but the final is not just the straight line. The final is after the turn from base leg.

"Q. Did you ask the tower for any permission before you lined up for final approach?—A. No.

"Mr. Bress. He hadn't said he lined up for final approach.

"The Witness. I called to the tower, after the turn from base and I began the final approach.

"By Mr. Galiher:

"Q. And you didn't ask the tower for permission before you began the final approach, did you?—A. I didn't have to

After seeing the Lockheed or Beechcraft taxiing from runway 3, Bridoux flew on for about one and one-quarter miles and made another 90-degree left turn to proceed on final approach, after which he headed north flying at 150 m. p. h. and at an altitude of about 1,200 feet. He said he then called the tower, advising he was on final approach and that the tower responded, saying, "Bolivian P-38, prepare to land on runway 3," and gave him the wind direction; and that he

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ask the tower for permission, after I had been cleared for landing, sir.

"Q. You hadn't been cleared to land at that point, had you, Captain?—A. I had been cleared for landing, and the first call from the tower cleared me for landing.

"Q. You mean when you were told you were No. 2 to land on runway 3?—A. Yes.

"Q. And that is the only clearance you have had up to this point?—A. I know I was the second.

"Q. And that was issued upon the final approach?—A. No; it was before the final approach.

"Q. Whether it was after or before you had begun the final approach, you had begun the final approach before you got any landing clearance from the tower.—A. No, sir. The first call from the tower was when I was cleared for landing.

"Q. For what?—A. They cleared me for landing.

"Q. For landing No. 2?—A. Yes, sir.

"Q. Did you tell us that being cleared for landing No. 2 is a landing clearance, a final landing clearance?—A. If they mention that word, it is.

"Q. You say it was a final landing clearance, the clearance that told you you were cleared to land on runway 3, behind another plane, or No. 2, as I think you used it?—A. No. 2. That was all.

"Q. No. 2. You have no way of knowing whether that plane you told us you saw when you were on downwind leg was the plane you later saw on the landing strip, or not, do you?—A. I saw the craft, and I assumed it was the No. 1, sir.

acknowledged the instruction. He then put his flaps down, reduced his speed to about 130 m. p. h., and began an S turn to line up with runway 3. As he did so he heard over the radio, "Clear to the left, clear to the left," but thought the instruction was for somebody on the ground. He did not turn to the left or take any other action, but continued on his course and the collision occurred two or three seconds later.

"Q. That plane you told us you saw as you were on downwind leg, west of the tower——A. Before.

"Q. Then you told us when you got down south, when you were turning on base leg, you noticed a plane that was landing or had landed—I think you used the expression——A. Yes.

"Q. On the landing strip.—A. Yes.

"Q. It was actually on the ground?—A. Yes, sir.

"Q. You had no way of knowing from that distance of five or six miles away, did you, whether that was the same plane you had previously seen, or some other plane, did you?—A. I don't know exactly. But I saw more or less the same airplane.

"Q. And you never tried to contact the tower to inquire whether or not the plane you had seen on final approach, as you call it, when you were on downwind leg, was the plane that was No. 1, did you?—A. But how am I going to ask the tower that? Am I going to say 'Is the plane I am seeing No. 1?' How is the tower going to know what plane I am seeing? There was no reason of calling back to the tower.

"Q. It would have prevented this accident, wouldn't it, if you had called the tower and inquired as to the identity of the plane ahead of you?—A. Except that I happened to observe this plane on final approach, not any other plane. Therefore I assumed this was the No. 1. This was the only one on final approach.

"Q. And that is where the trouble came in, because you assumed that was the plane that was ahead of you, isn't it, Captain?—A. Probably, sir."

The visibility from the P–38 was structurally limited so that Bridoux could not see ahead of him except at a considerable distance. He was flying entirely by time, computing the distance covered by multiplying his speed per minute by the number of minutes traveled. He said that at an altitude of 1,200 feet and four and a half miles from the airport he could see nothing ahead and below for a distance of two and one-half miles. It is also observed that Bridoux said that as he descended the nose of his plane was not more than ten degrees under horizontal, and that he was accomplishing the descent by reducing his speed. Thus there was not enough nose declination to increase appreciably the extent of visibility immediately in front of and below the P–38. Bridoux did not see the Eastern DC–4 at any time.

With the foregoing background, we turn to Eastern's contention that the court erred in admitting as evidence the approach and landing pattern offered as an exhibit by the appellees; and in instructing the jury it was a binding Federal regulation, a breach of which would constitute negligence *per se*.

With respect to the traffic pattern, the court charged the jury as follows:

> * * * [T]his pattern in a general sense provided that an aircraft arriving from the north and desiring to land at the Washington National Airport on Runway 3 would proceed from north to west, in the general vicinity of the Pentagon, and then proceed from that direction south, on * * * its downwind leg, and continue in that southerly direction south in the direction of the

George Washington Memorial Temple and south of the city of Alexandria; then turning due east on what is called the base leg, and ultimately what is called the final approach, a north or northeast heading.

* * * This is the prescribed pattern. But you are instructed as a matter of law that there is nothing rigid about it. It must be conformed to in a general way. In other words, the pattern is not a line drawn over the ground which must be followed by the airplane in question. It is just exactly as the word itself indicates, a pattern which must be followed, but not with the rigidity and the inflexibility of a line from one point to another. Indeed, the very purpose of flight traffic patterns is to control traffic, and at an uncontrolled airport it must be followed; but at a controlled airport, such as Washington, the controller has the final say; and you are so instructed.

However, the unauthorized stepping out of the pattern, leaving the pattern, departing from it—and note my language—the unauthorized stepping out of the pattern, leaving the pattern, departing from it, would be a violation of law, because the pattern is prescribed by rule which has the force and effect of law. And so, therefore, unauthorized action of the character I have just referred to would be negligence, as I have defined that term to you, and would be, as we lawyers say, negligence *per se,* in other words, would be negligence as a result of the very act itself and no further proof would be necessary. This is the negligence, in this aspect of the case, which the plaintiff alleges against Eastern. * * *

In insisting the court erred in admitting the traffic pattern as an exhibit and in instructing

the jury that it was a binding regulation and that an unauthorized deviation from the pattern would be negligence *per se,* Eastern relied on the fact that the traffic pattern had not been published in the Federal Register and cited *Hotch* v. *United States,* 208 F. (2d) 244, 250 (9th Cir. 1953), as authority that it was therefore not a binding regulation. The pattern had been officially prescribed, however, and Eastern had actual knowledge of it. In those circumstances we think the pilots of the DC–4 were required to follow the pattern and, since it is obviously a safety measure to some extent, the court correctly charged the jury that an unauthorized departure from it was negligence *per se.*

It is undisputed that the Eastern plane did leave the traffic pattern and circled into it again on final approach to the runway. Its departure from the pattern was not negligence if the tower had cleared the plane to land. Conceiving that an issue of fact had been developed as to whether the DC–4 had been cleared to land, the trial judge submitted that question to the jury and authorized it to return a verdict against Eastern if it should determine landing clearance had not been given,—that the Eastern plane had not been authorized by the tower to leave the traffic pattern as it did.

Whether this was error, as Eastern contends, depends on whether there was substantial evidence showing the DC–4 had not been cleared to land. On this charge of negligence against Eastern, as on all others, the burden of proof lay on the appellees. As substantial evidence sustaining the burden and showing the DC–4 had not

been cleared to land when it deviated from the pattern, they rely upon (a) their contention that the Eastern plane was late and, in order to make up time, short-cut the pattern without authority; (b) the testimony of Captain Ator; and (c) the testimony of Lt. Shaw. We consider those points in the order named.

(a) Even if it be conceded that the Eastern plane was late, it by no means follows that its pilots attempted an unauthorized landing to make up time. The point is without substantial weight as evidence of lack of landing clearance to the DC–4.

(b) Appellees further argue that, if Eastern was given any clearance, it was to land after the P–38; and in support of the suggestion they point to the testimony of Captain M. D. Ator, the check pilot of American Flight No. 1, which at the time of the crash was at the south end of runway 3 waiting to take off. Ator said his plane was informed by the tower ground control that it could take off after an Eastern DC–4 had landed. On the basis of this evidence, appellees argue as follows:

> * * * According to Tigner, he cleared Eastern to land first and the P–38 to follow Eastern. But if Ator was to take off after Eastern landed, he would have conflicted with the P–38. Thus the Ator testimony indicates that if Eastern was cleared, it was to land after the P–38.

The argument rests on a false premise. Tigner did not testify that he cleared the P–38 to land. He testified that he told the P–38 it was "No. 2 to land on runway 3." This did not authorize it

to leave the traffic pattern and descend. That it was No. 2 *to land* does not mean that Ator could not take off before it was cleared to land and after Eastern landed. In any event this testimony of Ator is insufficient to furnish a basis for a finding that if Eastern was cleared to land it was to be after the P–38.

(c) Lt. Meredith D. Shaw, co-pilot, was flying a National Airlines DC–4 en route from New York to Washington on the morning of November 1, 1949. The pilot, Captain Porter, was handling the radio. Shaw testified that when he was over Beltsville, Maryland, he heard the Eastern plane report by radio to the tower, giving its position and trip number; and heard the tower clear it to enter the left traffic pattern for runway 3. Immediately afterward, at approximately 11:42 or 11:43 a. m., he said his own plane was also cleared to enter the left traffic pattern for runway 3, but was told to check again with the tower when over Hains Point. He reached Hains Point at 11:45 or 11:46, and at that time heard another radio communication which said, "Eastern, traffic, a P–38," with a direction added which he did not remember. Shaw testified he did not at any time hear any clearance to Eastern to land, although he had earphones on continuously [5] and was on tower frequency, just as Eastern was.

To the contrary, Tigner testified positively that he cleared the DC–4 to land, after which it swung from the pattern in a wide turn to approach runway 3. He adhered to that statement despite vigor-

[5] He qualified this statement somewhat by saying that, from the time he was over Beltsville until his plane landed, "to the best of my recollection I never took off the headset."

ous cross-examination. Tigner further said the Eastern DC–4 followed his instructions throughout the entire flight. The first notice to Eastern that the P–38 was in the air was a few seconds before the impact when the tower said, "Eastern 537, make an immediate left turn. Traffic is P–38 above and behind you." Instantly responding to this direction, the engines of the DC–4 roared and the plane began a left turn but was struck before it could escape.

Thus the question is whether Shaw's negative testimony that he heard no landing clearance given Eastern had enough probative value, as against Tigner's affirmative statement that he gave the clearance, to form an issue of fact for the jury.

It is generally held in railroad crossing cases that negative testimony of a witness that he did not hear a warning signal from a locomotive is sufficient to form an issue of fact, in the face of affirmative evidence that the warning was sounded, provided the witness was in a position to hear, and provided his attention was not distracted. A different situation is presented, however, when the witness is shown not to have been in a position to hear or appears to have been inattentive. The testimony of such a witness that he did not hear the warning signal has little or no probative force. *Small* v. *Pennsylvania R. R.*, 65 App. D. C. 112, 80 F. (2d) 704 (1935); *Strider* v. *Pennsylvania R. R.*, 60 F. (2d) 237 (6th Cir. 1932); *Venchik* v. *Pennsylvania R. R.*, 18 A. (2d) 118 (1941); *Lanier* v. *Missouri P. R. R.*, 9 La. App. 586, 119 So. 710 (1929); *Zotter* v. *Lehigh Valley R. R.*, 280 Pa. 14, 124 Atl. 284 (1924); *Jensen* v. *Oregon Short Line R. R.*, 59 Utah 367,

204 Pac. 101 (1922); *Rickert* v. *Union P. R. R.*, 100 Nev. 304, 160 N. W. 86 (1916); *Young* v. *Erie R. R.*, 158 App. Div. 14, 143 N. Y. S. 176 (1913); *Jordan* v. *Osborne*, 147 Wis. 623, 133 N. W. 32 (1911); *Hubbard* v. *Boston & A. R. R.*, 159 Mass. 320, 34 N. E. 459 (1893). Under the rule just stated Shaw's negative testimony was insufficient to form an issue if he either (a) was not in a position during all the crucial nine-minute period to hear messages sent from the tower to the Eastern plane;[6] or (b) appears not to have been attentive to all tower broadcasts during that period.

It is an unquestioned and unquestionable fact that Shaw was not in a position to hear messages from the tower during all the critical nine-minute period. He testified that, when the radio switch button was depressed for transmission from his plane, incoming messages on that frequency could not be heard by him or Captain Porter. Consequently, whenever the latter called the tower during the nine-minute period, or depressed the switch button for that purpose, it was impossible for him or Shaw to hear a message broadcast from the tower to Eastern.

Captain Porter did not turn his radio selector to the tower until approximately 11:42 or 11:43. It follows that Shaw's plane was on tower frequency only during the last four or five minutes of the critical nine-minute period. The evidence is not clear as to when and how often during that

[6] The period from 11:38 a. m., when Eastern was cleared into the pattern, until 11:46–11:47 a. m., when the crash occurred.

brief period Porter depressed the switch button to call the tower and so shut off Shaw's ability to hear a message from the tower to Eastern.

In this connection it is to be noted that Shaw could not have heard the tower clearing Eastern to enter the left traffic pattern which he said he heard at approximately 11:42 or 11:43 while he was over Beltsville. This is so because the parties agreed and stipulated that Eastern received traffic pattern clearance at 11:38 a. m.—the exact time at which Shaw unequivocally said he was over the Baltimore relay about 15 miles northwardly from Beltsville,[7] with his radio not yet tuned to the tower. It is therefore clear that Shaw did not hear—as he said and no doubt thought he did—the tower clear Eastern to enter the traffic pattern.

What, then, did Shaw hear at approximately 11:42 or 11:43 a. m.? Tigner testified that at approximately 11:44 a. m. he cleared Eastern to land. Since both Shaw and Tigner were approximating the time, it may well have been that Shaw heard the landing clearance given at that time and inadvertently mistook it for traffic pattern clear-

[7] He was positive of that time and said the times of all other incidents thereafter to which he testified were fixed by him through arithmetical computations based on his presence at the Baltimore relay at 11:38 a. m.

He described the Baltimore relay as "a radio fixing where two beams meet * * * when you get a solid hum," which is approximately 15 miles northwardly from the Beltsville fan marker. The latter is a 75-megacycle transmitter just slightly northeast of Beltsville, Maryland. It makes a fan-shaped transmission into the air, by which planes are informed they are at Beltsville.

ance.[8] As we have said, it is certain he did not hear Eastern's clearance for the pattern. It follows that Shaw's statement that he heard no landing clearance to Eastern is unconvincing.

Moreover, Shaw's general situation was not conducive to careful attention, as he was operating the controls of his plane as it came over Beltsville to Hains Point and to the airport. The pilot, Captain Porter, was therefore primarily responsible for radio communications during that time. Shaw was handling the controls of a huge airplane and knew his colleague was charged with the duty of sending and receiving radio messages. We cannot attribute to him undivided attention to tower broadcasts to other planes, although he may have had earphones on. This is not to say he could not hear the communications he said he heard; but that he was not in the favorable attitude of one whose negative testimony is for that reason held to make an issue of fact.[9]

As to whether his testimony shows he listened carefully to the messages sent to Eastern by the tower—an illustration will be indicative: After testifying that at 11:45 or 11:46 he heard the tower say, "Eastern, traffic, a P–38," Shaw said, "And at that point he gave them a direction;

[8] We observe that in a statement given March 4, 1950, to an investigator of the CAB in Miami, Florida, Shaw said he "heard the tower giving Eastern landing clearance." To be sure, he testified that in making the statement he had misused the term "landing clearance." But whether he in fact misused the term "landing clearance" in describing the clearance he heard, is open to serious question because, as we have shown, he could not have heard the actual traffic pattern clearance which was given earlier to Eastern.

[9] Captain Porter did not testify.

but the direction didn't register." (By "direction" he said he meant the position of the P–38.) The direction of the Bolivian plane given to Eastern by the tower "doesn't stick in my mind," he said, although he remembered that a direction was given. The full message was stated thus by Tigner, who sent it: "Eastern 537, make an immediate left turn. Traffic is P–38 above and behind you." (Tigner is corroborated by other tower operators and also by undisputed evidence that thereupon Eastern began an immediate left turn.) So, Shaw's possible inattention is shown by the fact he heard only part of the message, and remembered only part of what he heard.

All these considerations show the inadequacy of Shaw's negative testimony; that his claimed failure to hear Tigner clear Eastern to land was due to the depression of the switch which cut off radio reception, or due either to inattention or misinterpretation, and was not enough to raise an issue of fact for the jury as to whether the DC–4 had left the traffic pattern without tower authority to do so.

The negative testimony is weakened further by the fact that, because of the human instinct of self-preservation and the disposition of men to avoid personal harm, Eastern's dead pilots are presumed to have acted with diligence and due care. *Atchison, T. & S. F. Ry.* v. *Toops,* 281 U. S. 351, 356 (1930); *Looney* v. *Metropolitan R. R.,* 200 U. S. 480, 488 (1906); *Campbell* v. *District of Columbia,* 64 App. D. C. 375, 78 F. (2d) 725 (1935); *Baltimore & P. R. R.* v. *Carrington,* 3 App. D. C. 101 (1894); *Bratt* v. *Western Air Lines,* 169 F. (2d) 214, 216 (10th Cir. 1948); *Northern Pac.*

R. R. v. *Spike,* 121 Fed. 44, 47 (8th Cir. 1903). It has been said the presumption "rises to the dignity of evidence." *United States* v. *Fotopulos,* 180 F. (2d) 631, 637 (9th Cir. 1950).

As we said in *Universal Airline, Inc.* v. *Eastern Air Lines, Inc.,* 88 U. S. App. D. C. 219, 188 F. (2d) 993 (1951), it is not for us to substitute our views for those of the trier of fact in the District Court when there is conflicting evidence. But here, as in that case, the evidence concerning the crucial fact is without substantial conflict. Affirmative testimony that the Eastern plane was cleared to land was not countered by evidence sufficient to form a factual issue; hence the appellees failed to carry their burden of showing the contrary by a preponderance of the proof. The intervention of the jury is required only where some question of fact is actually in controversy. *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 266 (1880).

While there were other charges of negligence against Eastern which were submitted to the jury, certainly the principal accusation was that it attempted to land without having been cleared by the tower to do so. Since the trial court simply asked the jury, "Is Eastern Air Lines liable?" and the jury simply answered, "Yes," we do not know in what way its members considered Eastern had been negligent; but we do know the jury was authorized by the court to find against the Air Lines if it should conclude the DC–4 had not received landing clearance. We are therefore forced to hold the trial court erred in submitting to the jury the question whether the Eastern plane unauthorizedly deviated from the traffic pattern.

Having so held, we thing it unnecessary to discuss the other grounds for reversal advanced by Eastern Air Lines. The judgments against it will be reversed, and the cases will be remanded for a new trial.

III

The principal question presented by the Government's appeal is whether the United States has consented to be sued for negligence of its control tower employees in regulating air traffic at a public airport. In answering the question, we must construe the Federal Tort Claims Act which limits the liability of the United States to that which a "private individual" would have "under like circumstances,"[10] and excludes claims arising from

[10] 28 U. S. C. § 1346 (b) and § 2674 are as follows:

§ 1346 (b). "Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

§ 2674. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall

the performance of a discretionary function or duty.[11]

The Government insists that its tower operators perform governmental functions of a regulatory nature; that no private individual has such power of regulation; that therefore the Act does not permit suit based on negligent performance of their duties. The situation involved here, says the Government, when viewed in all the circumstances, "cannot be equated to one which would predicate analogous private liability," and so it is said the claims are excluded from the coverage of the Tort Claims Act.

The history of the development of the control tower is helpful in considering whether there is or may be private liability analogous to that sought to be imposed upon the United States in this case. What is said to be the forerunner of the present control tower was constructed in 1931 at an air-

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be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, § 1, 62 Stat. 983."

[11] The pertinent portion of 28 U. S. C. § 2680 is as follows:

"The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

port in Cleveland, Ohio. During the following five years 20 other cities erected and operated towers, and by 1939 there were 52 towers being operated by municipalities.

Regulations promulgated under the Civil Aeronautics Act of 1938 provided for the issuance of certificates of competence to tower operators; and standard procedures, equipment, installations and tower operating techniques were suggested, but were not required to be adopted. November 1, 1941, the CAA issued a *Manual of Operations* setting forth Standard Airport Traffic Control Procedures, and shortly thereafter all certificated tower operators were required to apply them.

In August, 1941, Congress appropriated funds to enable CAA to maintain and operate a number of towers. Through gradual increase in funds available, the CAA was operating 165 of the country's 200 towers on November 1, 1949, the date of the accident involved here. As late as April 1954, there were still a number of towers in operation which had not been taken over by CAA personnel. The operators in those non-Government towers must be certificated by CAA before they may control civil aircraft in air commerce.[12] Such towers are subject to CAA inspec-

[12] 49 U. S. C. § 401 (6) includes within its definition of an *airman* "any individual who serves in the capacity of * * * air-traffic control-tower operator." And 49 U. S. C. § 560 (a) (2) prohibits any person from serving as an airman in any capacity without an appropriate certificate to so serve. To be eligible for a control tower operator certificate an applicant must meet physical, experience and other qualifications and must pass an examination on the subject of air traffic control. 14 Code Fed. Regs. Part 26.

tion;[13] and the Administrator of Civil Aeronautics has prescribed procedures and techniques which must be followed by the towermen. Nevertheless, these non-CAA controllers are not government employees, and perform no governmental function.

Airports are usually constructed, maintained and operated by municipalities, probably because the cost of construction is great and the prospect of financial reward does not attract private capital. But, as far as we know, as of November 1, 1949, there was no reason why a private individual or a private corporation could not construct an airport and operate a control tower manned by its own operators certificated by the CAA. Such an individual or corporation would of course be liable for the negligence of privately employed tower operators. It follows that, when the United States entered the business of operating a civil airport and an air traffic control tower in connection therewith, it assumed a role which might be and was assumed by private interests. Hence, under 28 U. S. C. §§ 1346 (b) and 2647, the Government is liable for the negligent acts or omissions of its control tower operators in the performance of their functions and duties, unless those Code provisions do not apply because the operators' activities are of the sort described in the exceptions subsection, § 2680 (a).

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[13] 49 U. S. C. § 556 is as follows:

"The Administrator of Civil Aeronautics is empowered to inspect, classify, and rate any air navigation facility available for the use of civil aircraft of the United States, as to its suitability for such use. The Administrator of Civil Aeronautics is empowered to issue a certificate for any such air navigation facility."

The United States insists that the subsection applies, and shields it from liability here. It argues that § 2680 (a)

> * * * incorporates into the Act the historic principle that the courts will not, in a private action, revise or review executive conduct involving the exercise of judgment or discretion of a public character;

that the tower operators' duties are public in nature and involve the exercise of discretion and judgment, with the result that neither the operators nor the United States can be held liable for their negligent performance.

The principle referred to is indeed historic, as it was stated in *Marbury* v. *Madison,* 1 Cranch [5 U. S.] 137, 169–170 (1803), and has since been consistently adhered to. We have no doubt that the principle was consciously restated by Congress when it declared in § 2680 (a) that the United States should not be liable on

> Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The heart of the question, however, is whether this case falls within the historic principle; whether the Government is correct in saying, as the second step in its argument, "that the tower operators' duties are public in nature and involve the exercise of discretion and judgment." We think the statement is incorrect, for the reasons hereinafter given. We hold that the tower operators merely handle operational details which are

outside the area of the discretionary functions and duties referred to in § 2680 (a); and that, consequently, the Tort Claims Act permits the Government to be sued for damages sustained because of their negligence.

Applicable authority is available to sustain our view, as comparable questions have been considered by other courts. *Costley* v. *United States*, 181 F. (2d) 723 (5th Cir. 1950), involved the question whether the Tort Claims Act permitted the Government to be sued for the negligence of its employees in an army hospital. A master sergeant's wife was admitted to the maternity section. As an incident to delivering her child, employees of the United States prepared and injected into her body a drug which was intended to be a spinal anaesthetic but in fact was a very harmful substance which caused the woman to be permanently paralyzed from the waist down.

The question on appeal from the District Court's dismissal was whether the employees were under a duty to use due skill and reasonable care in attending Mrs. Costley after having admitted her to the hospital under an army regulation authorizing her admission, or whether they were performing a discretionary duty or function which, under § 2680 (a), cannot be made the basis of a tort claim against the Government. The Court of Appeals quoted the army regulation that wives of soldiers may be admitted to army hospitals when suitable facilities for hospitalization are available, and then said, at page 725:

> With facilities available for her care, Mrs. Costley was admitted to the hospital

> pursuant to the above regulation. Having decided that there were facilities available, and having admitted her for treatment, the hospital authorities no longer had any discretion to exercise with regard to whether she was to receive careful or negligent treatment. A duty arose at this point to treat her with the same care, skill, diligence, and ability, that would be owing by a private person or corporation under the same or similar circumstances.

In accord are *Somerset Seafood Co.* v. *United States,* 193 F. (2d) 631 (4th Cir. 1951), and *United States* v. *Gray,* 199 F. (2d) 239 (10th Cir. 1952). Judge Dobie's *Somerset* opinion sufficiently distinguishes *Feres* v. *United States,* 340 U. S. 135 (1950), by saying, at page 634:

> * * * All that case really decided was "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries [arose] out of or are in the course of activity incident to service."

The holding of the *Costley, Somerset* and *Gray* cases was neither overruled nor impaired by the later decision of the Supreme Court in *Dalehite* v. *United States,* 346 U. S. 15 (1953).[14] That was a test case representing some 300 separate personal and property claims aggregating $200,000,000 which were based on explosions of fertilizer with an ammonium nitrate base, at Texas City, Texas, in 1947. Suing under the Tort Claims Act,

[14] The Government says the *Somerset Seafood Company* case was overruled by the *Dalehite* opinion. We think not; our analysis of that opinion convinces us to the contrary.

the plaintiffs claimed negligence substantially on the part of the entire body of federal officials and employees involved in a program of production of the material—Fertilizer Grade Ammonium Nitrate (FGAN)—in which the original fire occurred and which exploded. This fertilizer had been produced and distributed at the instance, according to the specifications, and under the control of the United States.

The question before the Court was whether the acts and omissions alleged as negligence were done or omitted in the performance of or failure to perform a discretionary function or duty within the meaning of § 2680 (a). The Court said, at page 34:

> * * * The "discretion" protected by the section * * * is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.[15]

The statement just quoted was supported by footnote 30, which is as follows:

> It seems sufficient to cite *Marbury* v. *Madison,* 1 Cranch 137, 170; *Spalding* v. *Vilas,* 161 U. S. 483, 498; *Alzua* v. *Johnson,* 231 U. S. 106; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 131.

The Court went on to say, at pages 35 and 36:

> It is unnecessary to define, apart from

[15] This is the "historic principle," referred to in the Government's brief, about which there can be no dispute. But, as we have said, the real question here is whether tower activities fall within the principle.

> this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. * * *

It was then pointed out that the Cabinet-level decision to institute the fertilizer export program was a discretionary act; that the basic "Plan" for the production of FGAN was drafted by the Office of the Field Director of Ammunition Plants in June, 1946, prior to beginning production. It was further stated that each of the specific acts of negligence charged in the manufacture of FGAN was in accordance with and done under specifications and directions set forth in the basic Plan for the production of fertilizer. Each of the acts looked upon as negligence was directed by this Plan. The Court concluded as follows, at page 42:

> In short, the alleged "negligence" does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program.

We may fairly infer from the statement just quoted that the United States is liable for the negligence of its employees at the operational

level, where there is no "room for policy judgment and decision." This leads us to the Government's argument that the negligence charged against the tower operators is the same as that charged against the Coast Guard in the *Dalehite* case, which the Supreme Court held was not actionable because of the discretionary exception. We quote in the margin the Supreme Court's disposition of the alleged negligence of the Coast Guard.[16]

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[16] 346 U. S. at pages 42–43 and 44:

"The findings of negligence on the part of the Coast Guard in failing to supervise the storage of the FGAN, and in fighting the fire after it started, were rejected by a majority of the Court of Appeals. 197 F. 2d at 777, 780, 781. We do not enter into an examination of these factual findings. We prefer, again, to rest our decision on the Act.

"The District Court's holding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion is like his specific citations of negligence discussed above. They are classically within the exception. 'The power to adopt regulations or bylaws * * * for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen * * * are generally regarded as discretionary, because, in their nature, they are legislative.' *Weightman* v. *Corporation of Washington*, 1 Black 39, 49. The courts have traditionally refused to question the judgments on which they are based. *Zywicki* v. *Jos. R. Foard Co.*, 206 F. 975; *Gotowski* v. *Mayor of Baltimore*, 127 Md. 502, 96 A. 630; *State* v. *General Stevedoring Co.*, 213 F. 51.

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"'* * * the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel

The Court made it clear that, as far as the alleged official dereliction of duty in failing to police the shipboard loading was concerned, the decision not to do so had been made at a policy-forming level and was not the decision of the individual members of the Coast Guard whose duty it would have been to do the policing had they been instructed to do it. The Court said:

> * * * To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.

We may paraphrase the quoted sentence thus:

> To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for the failure of the CAA to take over for maintenance and operation a certain air traffic control tower.

Had the Coast Guard authorities decided to supervise the storage, we have no doubt the United

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liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres* v. *United States*, 340 U. S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. * * *

* * * * *

"* * * To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

States would have been liable in tort for any causal negligence of its personnel acting at the operational level. So it is here: discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently.

The distinction between non-actionable planning and actionable negligence in carrying out the plan, was clearly stated by the Supreme Court in *Johnston* v. *District of Columbia,* 118 U. S. 19 (1886). Johnston's property was damaged when a sewer overflowed. He sued the District of Columbia, alleging that it "knowingly constructed and continued upon an unreasonable and defective plan, and of inadequate capacity for its purpose, and wrongfully permitted [it] to become clogged up." The Court said, at pages 20–21:

> The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. . But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the

> sewer may be sued by a person whose property is thereby injured.

With this distinction in mind, we turn to the trial court's opinion and find the following statement as to the nature of the acts and omissions of the tower operators which were held to constitute negligence:

> * * * As to negligence, I find that there was failure of the control tower personnel to issue a timely warning to the Eastern plane as to the P–38 being on final approach; in the failure, also, to warn the P–38 that Eastern was on final approach; in clearing both planes for the same runway at approximately the same time, having in mind their respective positions in relation to each other and the speed of both their approach and descent; and the failure to keep both planes advised as to the activities of the other; I find this to be negligence and concurrent both in character and in relation to that found by the jury with respect to the defendant Eastern. I find, further, that such negligence contributed proximately to the injury complained of.

The three negligent omissions and the one affirmative negligent act found by the court were not "decisions responsibly made at a planning level" and did not involve any consideration important to the practicability of the Government's program of controlling air traffic at public airports. The tower operators acted, and failed to act, at an operational level. While they were in a sense exercising discretion as to what they should and should not do, they were not performing the sort of discretionary functions contemplated by § 2680 (a) and clearly described in the *Dalehite* decision.

"It is therefore our opinion that, if a Government towerman negligently clears two planes to land on the same runway at the same time, or is guilty of some other negligent act or omission in doing his work, the Government is liable for resulting injury in the same manner and for the same reason that it is liable for injury done by the driver of a mail truck who, in exercising discretion as to how to drive, negligently runs through a red traffic light.

The Government contends, however, that even though its theory of non-liability under § 2680 (a) be rejected, the judgments against it should be reversed because the trial court's findings do not provide sufficient factual bases for its ultimate conclusion of negligence. We deem it unnecessary to do more than quote the pertinent findings of fact, which expanded the above quotation from the trial court's opinion:

> 3. At all times in question, there was available in good operating condition in the control tower at said airport and in each plane voice radio equipment for two-way contact between said tower and either plane or between the tower and both planes simultaneously.
>
> 4. For an adequate period of time before the collision, both planes were visible to the control tower personnel who observed said planes and knew that said planes were on converging approaches for landing on runway 3, and said personnel had an adequate opportunity to give timely warnings and instructions to each plane.
>
> 5. At all times in question, weather conditions at and near the airport were excellent and visibility unimpeded.

6. At all times in question, the Washington National Airport and the control tower facilities thereat were owned by the defendant, United States of America, and were being operated by it through its agents and employees (the tower personnel) assigned thereto by the Civil Aeronautics Administration, an agency of the United States.

7. The said agents and employees of the United States in their operation of the control tower at said airport failed to exercise reasonable care and were guilty of negligence in the circumstances in question in that, having in mind the respective positions of said planes in relation to each other and their speed of approach and descent:

(a) They failed to issue a timely warning to the Eastern plane concerning the P–38 on final approach;

(b) they failed to warn the P–38 that the Eastern plane was on final approach;

(c) they cleared both planes for the same runway at approximately the same time; and

(d) they failed to keep both planes advised of the activities of the other.

8. The negligence of United States through its agents and employees, as set out in finding No. 7 above, was a proximate cause of the fatal collision resulting in the deaths of plaintiffs' decedents, and such negligence of the United States also concurred with the negligence of Eastern as the proximate cause of said collision.

9. The collision occurred over the Potomac River within the boundary of the District of Columbia.

These findings seem to us to be sufficiently in detail to justify the conclusion of negligence.

It is observed that the Government does not directly charge that the evidence is insufficient to support the findings of fact which were made by the trial judge. We have considered the question, however, and have concluded there was proof adequate to support the findings, although it is meager with respect to the finding that the tower cleared both planes for the same runway at approximately the same time—which is probably the most important of the findings. For, although the trial court was amply justified in finding (contrary to the jury's apparent conclusion) that the Eastern plane was cleared to land—and indeed could hardly have found otherwise,—there is only slight evidence tending to show the Bolivian plane was ever cleared to land.

Bridoux himself practically conceded his own negligence (of which the jury rather unaccountably exonerated him) in mistaking the message "You are No. 2 to land" for actual and absolute landing clearance. But he did say:

"I said 'Washington Tower, Bolivian P–38 on final approach.' They responded to me immediately. * * * 'Bolivian P–38, prepare to land on runway 3.'" Consequently, if the trial judge believed, as apparently he did, that Bridoux actually sent such a message and received such an answer from the tower, there was some evidence that the tower gave landing clearance to the Bolivian as well as to the DC–4. We cannot substitute our judgment on a factual issue for that of the trial judge simply because we might have reached a different conclusion.

As to all the foregoing, the court is unanimous. We are divided, however, as to another con-

tention of the United States which remains to be considered: that it was error to measure the Government's liability under the law of the District of Columbia,[17] which does not limit the amount of damages for wrongful death, instead of under the law of Virginia, which limits recovery to $15,000 for the death of one person. The contention is based on the fact that, although the planes collided in the District of Columbia, the negligent acts and omissions of the tower operators occurred in the tower, which is in Virginia.

The general conflicts rule disregards the law of the place of the negligent act or omission and, instead, uses the law of the place where the injury was sustained. My brothers Edgerton and Fahy are of the view that the trial court erred in applying the general rule here because the Tort Claims Act provides in § 1346 (b) that—

> * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for * * * death caused by the negligent or wrongful act or omission of any employee of the government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with *the law of the place where the act or omission occurred.* [Emphasis supplied.]

They hold that Congress thus provided in explicit terms for the Government's liability to be measured under the law of the place where its negligent employee's act or omission occurred,

[17] The trial judge found from conflicting evidence that the accident occurred over the Potomac River, which is in the District of Columbia.

and that therefore the Act requires Virginia law to be applied in this case.

I do not agree that the language of § 1346 (b) compels us to conclude that Congress had in mind the general conflicts rule to which reference has been made and intended to make it inapplicable in situations such as this. I think the legislative expression "in accordance with the law of the place where the act or omission occurred" was intended to mean, and therefore should be construed as meaning, "in accordance with the law of the place where the tort occurred." An act, in legal as well as in popular use, is not merely a voluntary muscular contraction, but something more. The word commonly includes the consequences of the muscular contraction. If the defendant pulls the trigger and the bullet kills a man, in legal as in popular usage the killing is said to be the defendant's act.

In accordance with this usage, I interpret the statutory words "act or omission" as including not only the messages negligently sent or omitted by the tower operators, but also their immediate consequences. This is consistent with § 377 of *Restatement, Conflict of Laws* (1934), which reads: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

My interpretation also accords with that indicated by Assistant Attorney General Shea in his testimony before the House Committee on the Judiciary concerning the Tort Claims bill,[18] as

[18] Hearings before the House Committee on the Judiciary, 77th Cong., 2nd Sess., on H. R. 5373 and H. R. 6463 (Jan. 29, 1942), p. 9.

being the then interpretation of the Department of Justice. He said, when asked where a claimant brings suit, "Either where the claimant resides, or *in the locale of the injury or damage.*" [Italics supplied.] The witness was referring to the venue provision of the then pending legislation which is now 28 U. S. C. § 1402 (b):

> (b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. (June 25, 1948, ch. 646, § 1, 62 Stat. 937.)

The words of § 1402 (b) which he was construing are not only the same words which occur in § 1346 (b), with which we are concerned, but also were used with a direct reference to that section.

The judgments against the United States will be affirmed, except that the judgment for $50,000 in No. 12017 will be reduced to $15,000 to meet the limitation imposed by the law of Virginia on the amount of recovery.

The judgments in Nos. 11991 and 11992 are reversed and the cases are remanded for a new trial. The judgment in No. 10217 is affirmed as modified, and the judgment in No. 12018 is affirmed.*

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*This provision was amended by the order of June 24, 1955, *infra*, p. 50a.

United States Court of Appeals for the District of Columbia Circuit

January Term, 1955

No. 11991

EASTERN AIR LINES, INC., APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

January Term, 1955

No. 11992

EASTERN AIR LINES, INC., APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

January Term, 1955

No. 12017

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

January Term, 1955

No. 12018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia.

Before EDGERTON, WILBUR K. MILLER, and FAHY, Circuit Judges

Judgment

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court:

(1) that the judgment of the said District Court in Case No. 12018, *United States of America* v. *Union Trust Company, et al.* (Civil Action No. 4692–50) appealed from herein be, and the same is hereby, affirmed;

(2) that the amount of judgment of the said District Court in Case 12017, *United States of America* v. *Union Trust Company, et al.* (Civil Action No. 4691–50) appealed from herein be modified in conformity with the opinion of this Court and that said judgment as so modified be, and it is hereby, affirmed;

(3) that one-half the cost of the combined brief filed by appellees in Cases Nos. 12017 and 12018 be taxed against the United States and that one-half the cost of printing the joint appendix in these cases be taxed against the United States;

(4) that the judgments of the said District Court in Cases Nos. 11991 and 11992, *Eastern Air Lines, Inc.* v. *Union Trust Company, et al.* (Civil Actions Nos. 1892–50 and 1893–50) appealed from herein be, and the same are hereby reversed, and that said cases be, and the same are hereby remanded to the said District Court with directions to award a new trial;* and

*This provision was amended by the order of June 24, 1955, *infra*, p. 50a.

(5) that the docket fees and the taxable cost of the brief of appellant in cases Nos. 11991 and 11992 be taxed against appellees, Union Trust Company, et al., as Executor and Ancillary Executor of the Estate of Mildred E. Miller, and as Executor and Ancillary Executor of the Estate of Ralph F. Miller, et al., and that one-half the cost of printing the joint appendix in these cases be taxed against said appellees.

Dated February 8, 1955.

Per Circuit Judge WILBUR K. MILLER.

Filed February 8, 1955.

United States Court of Appeals for the District of Columbia Circuit

January Term, 1955

No. 12017

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

No. 12018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

Before EDGERTON, WILBUR K. MILLER and FAHY, Circuit Judges, in Chambers

United States Court of Appeals for the District of Columbia Circuit. Filed February 28, 1955. Joseph W. Stewart, Clerk.

Order

Upon consideration of appellant's motion for an enlargement of time to March 24, 1955, to file a petition for rehearing in banc and to stay the mandate of this Court, and it appearing that appellee and that appellant in case No. 11991 and case No. 11992 have consented thereto, it is

Ordered by the Court that the time within which appellant may file a petition for rehearing in banc be, and it is hereby, extended to March 24, 1955.

It is further ordered by the Court that the issuance of the mandate of this Court be, and it is hereby, stayed to and including March 24, 1955.

PER CURIAM.

Dated February 28, 1955.

United States Court of Appeals for the District of Columbia Circuit

January Term, 1955

No. 12017

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

No. 12018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

Before EDGERTON, WILBUR K. MILLER and FAHY, Circuit Judges, in Chambers

United States Court of Appeals for the District of Columbia Circuit. Filed February 28, 1955. Joseph W. Stewart, Clerk.

Order

Upon consideration of appellees' motion for enlargement of time to March 24, 1955, to file a petition for rehearing in banc, or by the division which heard the cases, and it appearing that appellant has consented thereto, it is

Ordered by the Court that the aforesaid motion be, and it is hereby, granted.

PER CURIAM.

Dated February 28, 1955.

United States Court of Appeals for the District of Columbia Circuit

April Term, 1955

No. 12017

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

No. 12018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

Before EDGERTON, PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, in Chambers

Order

Upon consideration of appellant's petition for a rehearing in banc in the above entitled cases, it is

Ordered by the Court that the aforesaid petition be, and it is hereby, denied.

PER CURIAM.

Dated April 15, 1955.

Chief Judge Stephens and Circuit Judge Bazelon did not participate in the foregoing order.

Filed April 15, 1955.

United States Court of Appeals for the District of Columbia Circuit

April Term, 1955

No. 12017

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

No. 12018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

Before EDGERTON, PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, in Chambers

Order

Upon consideration of appellees' petition for rehearing in banc or by the original division in the above entitled cases, it is

Ordered by the Court that insofar as petition is made for a rehearing in banc, the aforesaid petition be, and it is hereby, denied.

PER CURIAM.

Dated April 15, 1955.

Chief Judge Stephens and Circuit Judge Bazelon did not participate in the foregoing order.

Filed April 15, 1955.

United States Court of Appeals for the District of Columbia Circuit

April Term, 1955

No. 12017

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

No. 12018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

Before EDGERTON, Acting Chief Judge, WILBUR K. MILLER and FAHY, Circuit Judges, in Chambers

Order

Upon consideration of appellees' petition for a rehearing before the original division, and of appellant's response thereto, it is

Ordered by the Court that the aforesaid petition be, and it is hereby, denied.

Dated May 11, 1955.

PER CURIAM.

Circuit Judge Wilbur K. Miller would grant the aforesaid petition for rehearing.

Filed May 11, 1955.

United States Court of Appeals for the District of Columbia Circuit

April Term, 1955

No. 11991

EASTERN AIR LINES, INC., APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

No. 11992

EASTERN AIR LINES, INC., APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

Before EDGERTON, WILBUR K. MILLER and FAHY, Circuit Judges, in Chambers

Filed June 24, 1955.

Order

Upon consideration of appellees' motion for leave to file a motion to clarify or modify judgments in the above entitled cases, and it appearing that said motion to clarify or modify judgments has been lodged with the Clerk, it is

Ordered by the Court that the Clerk be, and he is hereby, directed to file forthwith appellees' motion to clarify or modify judgments; and upon consideration of appellees' motion to clarify or modify judgments, and of appellant's reply and opposition thereto, it is

Ordered by the Court that the opinion of this Court entered herein February 8, 1955 be, and it is hereby, amended by adding on Page 36 after the words "are remanded for a new trial" the following words, "restricted to the issue of liability", so that the sentence as amended will read:

> The judgments in Nos. 11991 and 11992 are reversed and the cases are remanded for a new trial restricted to the issue of liability.

It is further ordered by the Court that the judgment entered herein February 8, 1955, be, and it is hereby, amended by adding in Paragraph 4, in the fifth line, after the word "trial", but before the semicolon, the words, "restricted to the issue of liability", so that said line as amended will read:

> to the said District Court with directions to award a new trial restricted to the issue of liability; and

PER CURIAM.

Dated June 24, 1955.

Supreme Court of the United States

No. , October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

UNION TRUST COMPANY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August ninth, 1955.

FELIX FRANKFURTER,
Associate Justice of the
Supreme Court of the United States.

Dated this ninth day of July 1955.

APPENDIX B

The relevant provisions of the Federal Tort Claims Act (60 Stat. 842, 62 *id.* 869, 933, 982 *et seq.*, are as follows:

28 U. S. C. 1346 (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

28 U. S. C. 2680.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

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FILED
SEP 16 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 296

UNITED STATES OF AMERICA,
Petitioner

v.

UNION TRUST COMPANY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR UNION TRUST COMPANY, ET AL. IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1955

No. 296

UNITED STATES OF AMERICA,
Petitioner

v.

UNION TRUST COMPANY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR UNION TRUST COMPANY, ET AL. IN OPPOSITION

The United States has filed a petition for a writ of certiorari to review the decision below on the grounds: (1) that this case presents questions of far reaching importance parallel to those now pending before this Court in *Indian Towing Company* v. *United States,* No. 213, Oct. T. 1954; (2) that like *Indian Towing* this case involves the question whether under *Dalehite* v. *United States,* 346 U.S. 15, the Government is liable for injuries caused by the negligent malfunctioning of a federally operated warning system designed to protect those engaged in commerce, and; (3) that unlike *Indian Towing* this case involves the further question whether C.A.A. control tower operators perform a "discretionary function or duty" excluded under Section 2680 (a) of the Federal Tort Claims Act.

The United States has also filed a memorandum in No. 297 stating that if its petition in No. 296 is granted it does not oppose the granting of the petition of Union Trust Company, et al., in No. 297 involving the question whether, as to interstate torts, the Act alters the established conflict of laws rule applying the law of the place where the accident occurs rather than of the place where the negligent actor stood. However, the Government's memorandum goes on to assert that that question is not of certiorari stature because: (1) it has not *yet* arisen in a sufficient number of cases to indicate it will be of widespread importance, and; (2) in any event, the express statutory language supports the decision below even though there is a noticeable absence of any expression of legislative intent or purpose [1] to alter the established conflicts rule in the way the court below held Congress had done in enacting 28 U.S.C. 1346 (b).

For reasons already stated in our petition in No. 297, we firmly believe that petition should be granted without regard to this Court's action on the Government's petition in No. 296. The pusillanimous "opposition" so indicates. The question raised in No. 297 has now arisen and the orderly administration of justice ought not to await a flood of lower court indecision which can be avoided by this Court's action now. And, insofar as the merits are concerned, it is no answer to say, as the Government has in effect said, that the established conflicts rule was altered by the "precise language" of the statute no matter how unwittingly, how unintentionally or how void of reason.

Regardless of action taken in No. 297, there is no question raised in No. 296 justifying certiorari. Seeking to

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[1] The Government cannot even point to any published or unpublished expression of the draftsman (the Department of Justice) indicating any reason for or intent to alter the established conflicts rule.

equate this case to *Indian Towing*, the petition frames an issue claimed to involve a so-called "government function" and it asserts that the question involved is whether the Government is liable under the Act by reason of the "negligent failure to accomplish a uniquely governmental objective—protecting and safeguarding those engaged in commerce" (Pet. in No. 296 at p. 18). However, for the reasons carefully spelled out by both courts below, no such question is really involved and the decision below is plainly consistent with the decision in *Dalehite*. The opinion below clearly, unanimously and convincingly demonstrates that whatever the legitimacy or scope of the alleged implicit exception for negligence arising from the performance of a "governmental function," the activities of control tower operators are not of that character. And for that reason, there is in fact no parallel between this case and *Indian Towing* and, therefore, no reason for this Court's consideration on certiorari.

Due to lack of an opinion in the trial court and the per curiam opinions in the Fifth Circuit and here, the judicial reasoning in *Indian Towing* cannot be determined. However, the Government's brief filed on the original hearing here is informative. After detailing the history of lighthouse operations (Brief pp. 11-16), the brief concludes (at pp. 38-39):

> "As we have already shown, the construction, maintenance and operation of lighthouses and of other general navigational aids are functions which, from the earliest days of our country, have been performed by the Federal Government . . . More than that, for almost half a century, Congress has expressly prohibited any private person or other public body from undertaking this function except for very limited private purposes (*supra*, fn. 8 at p. 14). Where the activity which itself causes the damage is peculiarly governmental and prohibited to private persons, it is especially difficult to perceive how there can be any

analogous liability of a private person in like circumstances."

The operation of control towers at airfields is vastly different, both historically and functionally. As the court below pointed out—although the Government here seeks to sugar-coat the facts—the operation of control towers has not been and is not now uniquely governmental. Between 1926 and 1941 (inclusive) the federal government did not operate a single airport control tower, although it did operate other air facilities such as radio range stations and radio beacons. C.A.A. *Statistical Handbook of Civil Aviation* (G.P.O. 1948), p. 19. By 1939, after the Civil Aeronautics Act had already become law, there were 52 towers being operated non-federally by cities (apart from how many may have been operated by private concerns). *Digest of Airways Operations Service* (G.P.O., 1948) Vol. I, pp. 23-25. And even when the accident in question occurred in 1949, 35 towers were operated by others than the federal government. U. S. Pet. in No. 296, fn. 4, p. 6.

Thus, on the facts there is nothing uniquely governmental in the operation of airport control towers so that, in contrast to *Indian Towing,* one need not search for private parallel to the activity out of which governmental tort responsibility was established below. Certainly during the fifteen year period 1926-1941 when *all* control towers were non-federal, liability for their negligent operation could not have been defeated by the present argument that tower operation is "characteristically governmental." And nowhere in the Government's petition or its briefs below do we find any suggestion that the basic functions of control towers were altered when the Government began operating them. Accordingly, the mere shift from private or local operation of control towers to federal operation (whether direct or supervised) would not, *per se,* make those operations uniquely or char-

acteristically governmental. That this shift does not alter the nature of the function performed from private to public is further evident, for example, in the liability of municipalities for negligent (and exclusive) operation of gasworks, light and power plants, waterworks, street railways, subways and other public utilities and facilities including airports.[2]

Legislative materials relating to Federal training of control tower operators and the staffing of major towers by C.A.A. personnel plainly show that it was recognized that control tower activities were essentially local in purpose, effect and benefit, but that the Federal Government granted its aid because local governments and private interests were financially unable to support these safety progams.[3] Insofar as the Federal Government operates local control towers, it is in the nature of a grant-in-aid program such as is common in education, public health and roads, which does not convert the activity thus aided from local to uniquely or characteristically Federal. The arrangement stems from the desire for standardized and efficient air control and local solicitation for such aid,

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[2] See, e.g., McQuillin, *Municipal Corporations* (3d ed.) Vol. 18, §§ 53.90-53.116; Annotation 31 A.L.R. 1307. If the situation were otherwise, were the Government, as in war or strikes, to take over all the railroads, it could argue that tort liability for such activities was eliminated because of the elimination of private operators. But in *Gardner* v. *Panama R.R.*, 342 U.S. 29, decided prior to an amendment of the Tort Claims Act to cover the specific situation, the Government was held liable for operational accidents occurring during its take over.

[3] 49 U.S.C. §452 (d) (1) provides in part that "The Administrator is authorized . . . to train *civilian* and Governmental air-traffic control tower operators or to conduct programs for such training . . ." (Emphasis supplied). See also C.A.A. report on "Economic Aspects of Airport-Traffic Control Towers," Hearings before House Subcommittee of The Comm. on Appropriations, (80th Cong., 2nd Sess.) on the Dept. of Commerce Approp. Bill for 1949, at pp. 228-230.

not from any Federal compulsion.[4] Consequently, C.A.A. tower control personnel at an ordinary municipal airport, for example, perform services as an integral part of the airport operation for which the municipality would be liable.[5] The utilization of Federal lent servants does not alter the function performed nor the duty owed by the airport operator to the public invited to use the airport.

Thus, whatever might be said with respect to Government liability were this a case—which it is not—where liability was predicated upon its omission to act in establishing or maintaining control towers, once it has affirmatively taken over this mission and established a control

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[4] The Government has noted that it does not have a mandatory duty to maintain all control towers which, in leaving the field open to others, is hardly consonant with the notion that the activity is characteristically governmental.

[5] "The overwhelming weight of authority is to the effect that the construction, operation and maintenance of an airport by a municipality is a proprietary function and that such municipality may be held liable in tort for the negligent operation thereof." *Rhodes* v. *Asheville*, 230 N.C. 134, 52 S.E. 2d 371 (1949). To the same effect, see McQuillin, *Municipal Corporations* (3d ed.) §53.96, and Annotations 16 A.L.R. 2d 1083, 83 A.L.R. 350, 99 A.L.R. 183, 138 A.L.R. 126. Operation by a city of an airport is a proprietary function although operations prove financially unprofitable because *"an airport . . . is essentially a part of the city's transportation system . . . an airport is a true analogy to a railroad station or a bus terminal."* *Mobile* v. *Lartigue*, 23 Ala. App. 479, 127 So. 257 (1930) (Emphasis supplied).

The operation of Washington National Airport, the only civil airport owned by the United States, is of the same character. It is a business enterprise purely and simply and has been so consistently recognized by the Federal Government. See, e.g., letter of May 6, 1954 from Secretary of Commerce recommending enactment of bill to incorporate the airport based on the finding by the (Hoover) Commission on Organization of the Executive Branch of the Government that it is a "straight-line business enterprise" producing a substantial income. 100 Cong. Rec. 5983 (May 11, 1954), relating to introduction of S. 3435.

tower in lieu of a private tower, it is obliged not to injure the users of the particular airfield by the negligent performance of the control tower activity which it has undertaken. Paraphrase from *United States* v. *Lawter*, 219 F. 2d 559 (1955), where the Fifth Circuit, distinguishing its decision in *Indian Towing*, held the Government liable for a death negligently caused by the Coast Guard in a helicopter rescue mission.[6]

The guise of an activity uniquely or characteristically governmental is sought to be supplied by the petition's emphasis that "The control tower is the nub of CAA's extensive network of regulation and control of air traffic" (p. 25). But even assuming that efficient regulation of air traffic requires control towers, it does not follow that the activity thus becomes characteristically governmental. Non-federal control towers have operated and do operate so that their inherent or characteristic functions cannot be said to be federal even though the part they play, the lack of non-federal funds to maintain them and efficiency of centralized operation, indicates the practical wisdom of federal intervention. Indeed in a parallel field of activity, the railroads, federal regulation is intensive but control facilities such as signal and switching towers—designed and required as part of a federal program to safeguard those engaged in commerce—are left to private operation and responsibility.

As a practical matter, whatever might be said of enroute air navigational facilities and aids, the control tower is not the nub of the regulatory system nor an indispensable part of the control of air commerce. Many airfields operate without such towers and, as the petition itself shows, the need for a tower at a particular airfield becomes more significant only as traffic at that field increases. In other words, the control tower is the nub of and an integral

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[6] The Government did not petition for certiorari in *Lawter*.

part of local airport operation to move traffic in and out of a particular airport and as such is part of an activity (airport operation) which, except for Washington National Airport, is completely non-federal in operation.

In short, there is nothing uniquely or characteristically governmental about control tower services whether analyzed from the standpoint of who performs the services or what the nature of the services is.

Having disposed of the effort to equate this case to *Indian Towing* as an excuse for invoking certiorari, we turn to the claim that a "discretionary function or duty" is involved. At the outset, it is significant that the petition does not assert that in this regard any new or unique problem is raised not already disposed of in *Dalehite*. All the petition suggests as a basis for certiorari is (1) that the court below misread *Dalehite* as creating a magic formula for evaluating activities as discretionary or non-discretionary depending upon whether they are at the "policy level," and (2) that consequently the court below decided this case erroneously because of its application of that unsound mechanized approach to the discretionary function immunized by the statute. We do not so read the opinion below. Indeed, that opinion, like *Dalehite*, reveals that the determination whether an act involves executive discretion in the traditional and legislative sense requires an analysis of all the facets of the activity of which the "level" at which the decision is made is only one. We submit that the Government's effort to read the decision otherwise is transparently no more than an effort to "create" a question so as to seek review on certiorari.

On the merits, the issue raised by the Government's reliance upon the "discretionary function" exception is more imaginary than real. It relies more upon semantics than upon the informative legislative and judicial history of the provision. While the limits of language do not permit

of an all-embracing definition of a "discretionary function or duty" not susceptible to labored arguments of construction or application, nevertheless there is no doubt that the activities of airport control tower operators do not fall within its ambit.

As the court below stated (U.S. 34a), citing *Johnston* v. *District of Columbia,* 118 U.S. 19 (1886), the Government overlooks the distinction between "non-actionable planning and actionable negligence"; "discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

Plaintiffs have not challenged the adoption of federal plans for the regulation of air commerce or the installation or overall regulation of control towers. The allegations of negligence established below are directed solely and exclusively to the ministerial duty in the operation of the tower.[7] Thus, judicial resolution of control tower negligence would not involve issues as to the constitutional or statutory validity of the federal aviation program. In contradistinction to *Dalehite,* the negligent acts relied upon here were those of specific lower echelon operational employees, involving neither their non-negligent performance of specific acts directed by an authorized Government program, nor the exercise of a policy making function. Perhaps the Government's error stems

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[7] *Cf. Worley* v. *United States,* 119 F. Supp. 719, 721 (D. Or., 1952) where in holding the Government liable for injuries caused by negligently set poison coyote traps, the court said "The policy of using these instruments may well have been adopted in the exercise of executive discretion. But the setting of the particular traps under all the circumstances and conditions must be judged according to the standard of what a reasonable man would have done or failed to do." In a footnote the court explained that employees exercising a discretionary function are to be distinguished from "those who perform the authorized function or duty after discretion has been exercised as to whether to undertake it."

from its failure to recognize "the existence of a continuum of possible types of discretionary action ranging from narrow, routine exercises of discretion to high level policy decisions." Note 66 Harv. L. Rev. 488, 490 (1953). As *Dalehite* states, §2680(a) embraces only those types of discretion in the higher ranges of the spectrum performed by those exercising legislative or administrative policy or planning authority. See also *United States* v. *White,* 211 F. 2d 79, 82 (C.C.A. 9, 1954). To what Tigner and his associates did or failed to do, one cannot fairly apply this Court's test that "where there is room for policy judgment and decision there is discretion." [8]

Finally, tower controllers do not "regulate." The Government confuses persons who regulate with those who are regulated. In many areas the Government extensively regulates activities (viz., securities and livestock exchanges, railroads, communication systems, public utilities) which activities are not themselves of a governmental regulatory nature. Obviously the error lies in abuse of the word "regulate." The control tower man does not regulate in a legal sense, for he adopts no rules for general application nor does he create standards. On the contrary, he merely acts at the operational level subject to pre-existing regulations, standards and policy laid down by the statute and its administrators. In this respect the tower controller, whether a C.A.A. employee

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[8] Nor, as the Government argues, is that part of *Dalehite* dealing with alleged negligence of the Coast Guard apposite because it concerned (1) the failure to promulgate regulations for loading and unloading the FGAN from ships, and (2) an alleged failure in fighting fire, a type of activity covered by a well recognized common-law immunity. 346 U.S. at 43. Neither of these assigned reasons for exculpating the Coast Guard is applicable here because the tower control operators were not charged with negligence for failure to adopt regulations at their level of activity, nor is there any classical common-law immunity for the functions they were performing such as there is for fire fighting. On the contrary, were a private airport involved in the same circumstances there is no question but that liability would exist.

or a private employee of a non-federal airport, is a regulatee occupying the same status as many other private employees who are regulated (but do not regulate) under the federal aeronautics program.[9]

In summary, no problem for resolution on certiorari is presented here because (1) in contrast to *Indian Towing*, liability was imposed below for negligence in the conduct of an activity integrally part of private airport operation and of a type which has been and is still being carried on by private persons, (2) the activity is such that, by any standards, it is outside the discretionary realm contemplated by 28 U.S.C. 1346(b), and (3) this case presents no new problem nor any departure from the decision of this Court in *Dalehite*.

Respectfully submitted,

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[9] For example, under federal air regulations a pilot of a commercial airliner is in command of the aircraft and thus authorized to direct and control passengers and crew (14 C.F.R. 61.110); private maintenance staffs of commercial airlines are authorized to inspect and certificate aircraft (14 C.F.R. 61.71 et seq.); private airline dispatchers are authorized to clear aircraft for flight (14 C.F.R. 61.191 et seq.); and private company check pilots are authorized to check the qualifications of pilots (14 C.F.R. 61.134). In each of these instances, just as in the case of control tower operators, private personnel of commercial airlines have the authority and backing of federal regulation to control, supervise or review the activities of other persons subject to federal regulation of air commerce. Yet it would be unthinkable to suggest that that limited authority to perform what are essentially operational functions is a power to "regulate" in the sense that their activities take on a sovereign immunity.

No. 296. UNITED STATES *v.* UNION TRUST CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is affirmed. *Indian Towing Co.* v. *United States*, 350 U. S. 61. *Solicitor General Sobeloff*, *Assistant Attorney General Burger*, *Paul A. Sweeney* and *Lester S. Jayson* for the United States. *David G. Bress*, *Sheldon E. Bernstein*, *Alvin L. Newmyer* and *Jo V. Morgan, Jr.* for respondents. Reported below: 95 U. S. App. D. C. 189, 221 F. 2d 62.

No. 298. UNION TRUST CO. ET AL. *v.* EASTERN AIR